SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 291

UNION BROKERAGE COMPANY, PETITIONER,

vs.

NORMAN G. JENSEN AND CURTIS M. RIME

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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[fol. 1]

IN DISTRICT COURT OF KITTSON COUNTY, 14TH JUDICIAL DISTRICT, STATE OF MINNESOTA

UNION BROKERAGE COMPANY, a Corporation, Plaintiff,

vs.

NORMAN G. JENSEN and CURTIS M. RIME, Defendants

COMPLAINT—June 7, 1941

The plaintiff for its cause of action against the defendants alleges:

I

That since January 14, 1928, it has been, and still is, a corporation, duly organized and existing under the laws of North Dakota, to engage in and authorized to transact the business of a customhouse broker pursuant to U. S. A. C. Title 19; Section 1641, commonly referred to as the U. S. Tariff Act of 1930, as amended; and for carrying on said business the plaintiff has been and is now a licensed [fol. 2] customhouse broker as provided by said Tariff Act, within the customs district No. 34, which comprises parts of Minnesota and North Dakota in the United States of America.

II

That the defendants have been, and are now, engaged in the customhouse brokerage business at Noyes, Minnesota, under the name and style of "Norman G. Jensen, Custom House Broker," and under a customhouse broker license issued to defendant Jensen by the Secretary of the Treasury; and the defendant Rhime assists the defendant Jensen in the conduct of said customhouse brokerage business under a power of attorney made, executed and delivered by the defendant Jensen, as licensee, to the defendant Rhime as his attorney in fact, granting to said Rhime the power and authority to clear dutiable shipments in the name of the defendant Jensen as the licensee at Noyes, Minnesota where defendants have their principal place of business.

That said license of defendant Jensen, and the use thereof as hereinbefore alleged, were assigned by the defendant

Jensen to the plaintiff under the circumstances and for the considerations hereafter stated; and the use of said customhouse broker license as in this paragraph alleged has been made and is now made in willful and wrongful breach of contract, without the authority of the plaintiff, and in violation of the duties devolving on the said defendant Jen-
[fol. 3] sen as the managing agent of the plaintiff; and the defendant Rhime has at all times known and fully understood said corrupt conduct and abuse of power by said Jensen.

III

Plaintiff, under its articles of incorporation, is authorized and empowered to issue common stock of the total par value of $10,000.00 and has issued its capital stock to the amount in par value of $10,000.00, distributed as follows, to-wit:

To Nan W. Anderson, shares of the par value of $3,700.00;
To Annie Kramer, shares of the par value of $3,600.00;
To Fraser Mackay, shares of the par value of $100.00;
To Wm. Mackay, shares of the par value of $100.00;
To Norman G. Jensen, shares of the par value of $2,500.00;

and its present board of directors and officers are:

Nan W. Anderson, President and Treasurer and Director;
Annie Kramer, Vice President and Secretary;
Fraser Mackay, Vice President;
Wm. Mackay, Director.

[fol. 4] IV

Said corporation, as such licensed customhouse broker, until the occurrence of the events hereafter stated, carried on its said business at great profit to itself and its stockholders.

V

Plaintiff corporation was organized and founded by Carl Anderson and H. O. Kramer who died a short time prior to the 6th day of September, 1938. On their death their respective shares of stock in the plaintiff corporation owned by them at the time of their death was duly and lawfully assigned as follows: To Nan W. Anderson, surviving spouse

of Carl Anderson the shares of stock mentioned in paragraph III of this complaint as standing in her name; to Annie Kramer, surviving spouse of H. O. Kramer, and to Harry O. Kramer, surviving son of H. O. Kramer the shares of stock mentioned in paragraph III of this complaint as standing in their names and on succeeding to the said shares of stock they also succeeded to the control and management of the business of the plaintiff corporation.

That the plaintiff had been doing a profitable business since its organization, and had earned and possessed an honorable business record. That the net income of the plaintiff corporation provided for the holders of its stock sufficient and suitable support for the holders of its shares of stock up to January 1, 1940, since which last mentioned [fol. 5] date no dividends have been paid or distributed on said shares of stock because of the wrongs committed against the plaintiff by the defendants as hereafter alleged.

VI

That for some time prior to the 6th day of September, 1938, the defendant Jensen carried on the business of customhouse broker as an individual in competition with the plaintiff at Portal, in the State of North Dakota, and on or about September 6, 1938, the plaintiff and the defendant Jensen entered into an agreement by the terms of which the business of the plaintiff and the said Jensen was merged to be conducted thereafter by the defendant Jensen as the plaintiff's managing agent.

That by the terms of said agreement the defendant Jensen agreed with the plaintiff that he would cease to carry on his business of a customhouse broker, assign, and use his license for and in plaintiff's business, and transfer his business, clients and customers and good will to plaintiff and to cease doing business as an individual customhouse broker and conduct the business of customhouse brokerage exclusively in plaintiff's name and solely for its use, to enter into plaintiff's service and assume the office of acting as the plaintiff's managing agent for the consideration of 25 shares of plaintiff's capital stock fully paid, a salary of $3,000.00 per year, payable at the rate of [fol. 6] $250.00 per month and the dividends distributable on account of the 25 shares of stock to be issued and delivered to him by the plaintiff, all in consideration of his

acceptance of said employment as plaintiff's managing agent to the exclusion by him of all other gainful occupations and business pursuits.

That in execution of said agreement the plaintiff issued to the defendant Jensen 25 shares of its capital stock fully paid, of the par value of $2,500.00, elected him to be one of its three directors, its president and general manager, and paid him the promised salary of $250.00 per month. In consideration thereof, and in execution of said agreement, the defendant Jensen accepted said offices and shares of stock and assumed the duties of said offices of the plaintiff on or about September 6, 1938.

That a memorandum of said agreement was made and executed by the defendant Jensen, and delivered by him to the plaintiff wherein, for the consideration aforesaid, the defendant Jensen specifically covenanted and agreed to conduct the business of the plaintiff honestly and fairly and for the sole benefit of the plaintiff. That a true and correct copy of said memorandum agreement is annexed to this complaint and made a part thereof and identified as Plaintiff's Exhibit "A".

VII

That plaintiff's Board of Directors during the defendant's management of plaintiff's business, consisted of said [fol. 7] defendant Jensen, Mrs. Nan W. Anderson and Mrs. Annie Kramer. That said directors Anderson and Kramer were inexperienced in conducting plaintiff's business and justifiably relied on and reposed full confidence in defendant Jenser as plaintiff's managing agent, and justifiably believed that he would discharge his duties honestly and faithfully as plaintiff's general manager and president. And defendant Jensen, well knowing that his associate directors of the plaintiff were his inferiors in understanding said business and its needs, and that they relied on him and trusted him, his management and his recommendations, fraudulently taking advantage thereof and of his aforesaid positions as president and general manager of the plaintiff took complete and exclusive charge of plaintiff's business and completely controlled plaintiff, its business, books of accounts, lists of clients and customers, with their addresses, all while ostensibly acting, and falsely pretending to act for and on behalf of plaintiff as its manag-

ing agent, and in furtherance of his plan to acquire control of plaintiff, required the board of directors to elect him plaintiff's treasurer and thereby he corruptly acquired control of plaintiff to such an extent and degree that the plaintiff was converted by defendant Jensen to be his instrumentality; and said conversion became complete on or about January 1, 1939, from which last mentioned date said [fol. 8] defendant Jensen continuously and absolutely controlled the plaintiff, its affairs, books and property, until November 5, 1940, when said defendant Jensen was required by plaintiff to resign as its manager.

VIII

That it was the duty of the defendant Jensen, while serving the plaintiff as director, president, treasurer and general manager, to honestly, diligently, faithfully and carefully administer the affairs and business of the plaintiff; to exercise the highest and most scrupulous good faith in transacting plaintiff's business and to manage plaintiff's affairs for its exclusive benefit; to keep honest, accurate and correct books of account of all the business, income and transactions of the plaintiff while managing its affairs; to acquire no personal advantage to himself from the conduct of plaintiff's business; to see that the property, effects and money of the plaintiff were not stolen, embezzled, wasted, squandered or misappropriated; to make and present to the stockholders of the plaintiff true and accurate accounts and statements of plaintiff's affairs from time to time as required by law and by its articles of incorporation and its by-laws; to surrender and account to the plaintiff for all money and property earned and acquired by plaintiff in the course and within the scope of its aforesaid business, and to faithfully and with absolute loyalty and fidelity per-[fol. 9] form his duties in said offices of the plaintiff; to abstain from engaging in any competing business; to use his broker's license only for the good of the plaintiff; to withdraw from the funds and the business of the plaintiff nothing for his own use except the salary earned in attending to its business; to faithfully and to the best of his ability and opportunity promote, protect and advance the business of the plaintiff and to faithfully and diligently perform all other duties devolving on him as such director, president, treasurer and general manager of the plaintiff.

That after having obtained control of the plaintiff as aforesaid, and while falsely pretending to discharge the duties of his office as plaintiff's manager, the within named defendant maliciously combined and confederated together to defraud the plaintiff of its business and to convert and appropriate plaintiff's said business to and for the use of the defendants, and to take and appropriate to themselves all of plaintiff's money, earnings, income and property.

IX

That pursuant to said conspiracy, with the malicious and unlawful intent aforesaid, the defendants, and other persons to the plaintiff unknown, while pretending to carry on the business of the plaintiff in their said fiduciary positions, falsely, fraudulently, maliciously, secretly and wrongfully [fol. 10] betrayed the plaintiff and its stockholders, for the purpose and with the intent to deprive the plaintiff of its business and income and to appropriate the same to their own use; and to effectuate said taking and conversion of plaintiff's business, income, money, earnings and property, the defendants, combining and confederating together, did:

(a) In pursuance of said conspiracy the defendants wrongfully, dishonestly and corruptly withheld from the plaintiff important and necessary and valuable trade and business information among which is the decision of the Canadian Pacific Railway Company made in 1939, as plaintiff is informed and believes, to re-route its rail shipments over its lines from Canadian shipping points into the United States from Portal in North Dakota to Noyes in Minnesota, so that thereby the plaintiff was prevented from adjusting or expanding its offices and business machinery in time to take advantage of said change by moving from Portal, North Dakota to Noyes in Minnesota to serve in clearing shipments routed through the port of entry at Noyes, Minnesota, instead of Portal, North Dakota.

(b) On discovering the change in routing rail shipments of goods and merchandise requiring the payment of duty as aforesaid, in wanton disregard of defendants Jensen's duty in the premises, the defendants took and appropriated to themselves Plaintiff's list of Canadian and American ship- [fol. 11] pers of goods and merchandise requiring clearance at the American ports of entry in customs district #34 and

falsely, and with the fraudulent intent to cheat and defraud the plaintiff, induced such shippers, named in said list, to route their shipments into the United States through Noyes, Minnesota, and to consign said shipments away from plaintiff to the defendant Jensen;

(c) Visit plaintiff's established clients and railway freight agents, and with the intent to cheat and defraud the plaintiff of its business and income, falsely and fraudulently stated and represented to plaintiff's trade, clients and railway freight agents that plaintiff was not allowed or empowered to carry on the business of a customhouse broker at the port of Noyes, Minnesota, because the plaintiff had entered into an agreement, then in force, with one W. F. Mackay, by the terms of which agreement plaintiff had agreed to stay out of Noyes, Minnesota, and refrain from engaging in the business of a customhouse broker from and at said last named port of entry. That the defendants did then and there well know and understand that his said statements and representations were false; that no such agreement existed, but that plaintiff was duly empowered to do business at Noyes, Minnesota, and defendants uttered said false statements and representations maliciously with the wrongful intent to induce shippers of goods into the United States to route and consign their shipments to defendant [fol. 12] Jensen at Noyes, Minnesota, for clearance and to thereby deprive the plaintiff of its business, and to convert its said business and the profits therefrom to themselves.

(d) In breach of his aforesaid duties, and while falsely pretending to execute the duties of managing the affairs of this plaintiff, the defendant Jensen, wrongfully and fraudulently, aided and abetted by defendant Rhime, wilfully, wrongfully, maliciously, and for the purpose and with the fraudulent intent aforesaid, falsely stated and represented to plaintiff's clients and customers, but without the knowledge of or notice to the plaintiff, that he, the said Jensen, had opened an office as customhouse broker at Noyes, Minnesota, for himself, and, with the malicious and fraudulent intent aforesaid, requested the clients of the plaintiff to consign their shipments to him as their agent to clear such shipments at Noyes, Minnesota, all of which acts were done by the defendants while defendant Jensen paid himself the salary agreed upon for serving the plaintiff as its managing agent and president out of plaintiff's funds.

(e) Altered and changed bills of lading on shipments into the United States, consigned to the plaintiff, so that such shipments were made to appear, after such wrongful alterations, to have been originally consigned to the defendant Jensen at Noyes, Minnesota; and taking advantage of [fol. 13] said false and forged consignments, defendants corruptly cleared them for the profit of the defendants, and deprived the plaintiff of said fees, contrary to the authority vested in said defendant Jensen as plaintiff's manager.

(f) Solicited business for defendant Jensen, individually while falsely and fraudulently pretending to the plaintiff that defendant Jensen was carrying on the business and discharging the duties devolving on him as the managing agent of the plaintiff;

(g) Appropriated and used plaintiff's money spent by him and his confederate in carrying on said betrayal of the plaintiff by corruptly trying to deprive plaintiff of its business, and in converting it to the use of defendant Jensen as aforesaid;

(h) Appropriated, concealed, spirited away or destroyed plaintiff's books, lists of clients, records and correspondence, and refused to discover or deliver to plaintiff its said books, records and correspondence when demanded of him, in violation of his duties in the premises.

(i) Instructed the Canadian Pacific Railway Company to omit from its "Customs Circular" issued on July 25, 1940, the name of the plaintiff as a licensed customhouse broker for Noyes, Minnesota, and to substitute for the name of the plaintiff the name of the defendant Norman G. Jensen as the licensed customhouse broker at Noyes, Minnesota; and pursuant to said instructions and directions of the de- [fol. 14] fendant the said Canadian Pacific Railway Company omitted plaintiff's name from said customs circular issued by it on July 25, 1940 and inserted the name of the defendant Jensen in place of the name of this plaintiff in its said circular. That to effect said change, and to secure the insertion of his own name in place of plaintiff's name, the defendants, for the purpose and with the unlawful and wrongful, fraudulent and corrupt intent aforesaid, and to execute said wrongful conspiracy, falsely and fraudulently stated and alleged to the said Railway Company that plaintiff's business of customhouse brokerage at Noyes, Minne-

sota, was thereafter to be carried on in the name of defendant Jensen because the plaintiff did not have the customhouse broker license required to do business as customhouse broker in Minnesota. That said statements were known to be false when uttered by the defendants.

(j) While acting as the employee, and actually occupying the offices of president and manager of the plaintiff, and while in full and absolute charge and control of the plaintiff's affairs, the defendants without knowledge thereof by or notice to, the plaintiff, and without plaintiff's consent, agreed among themselves that the said Norman B. Jensen should grant to the defendant Rhime his power of attorney under which said Rhime should assist and act for and in the name of said Norman G. Jensen in conducting the business [fol. 15] of a customhouse broker at Noyes, Minnesota, in defendant Jensen's name; that said power of attorney was thereupon duly made and executed by said Norman G. Jensen, constituting and appointing the defendant Rhime his attorney in fact, and said defendant Rhime accepted said power and appointment as attorney in fact for the said Norman G. Jensen and duly filed said power of attorney with and in the office of the U. S. Collector of Customs, and ever since said defendants have operated said business at Noyes, Minnesota, in the name of defendant Jensen in violation of said Jensen's authority. That said power of attorney was made and filed as aforesaid at a time unknown to the plaintiff, but plaintiff alleges, on its information and belief, that it was made and filed as aforesaid on or about January 1, 1940. That said power of attorney was made, accepted and filed as aforesaid for the sole purpose of placing the defendant Rhime in position to assist, aid and abet the said Norman G. Jensen in cheating and defrauding the plaintiff of its business and income in execution of said unlawful, wrongful and fraudulent conspiracy, conceived and executed by the defendants for the purpose and with the intent to appropriate to themselves plaintiff's established business and income; and during all of said times, and when said acts were committed and until recent dates, the defendants falsely and fraudulently represented to the plain- [fol. 16] tiff that said Norman G. Jensen was honestly and faithfully attending upon the regular business of the plaintiff for its benefit and profit.

(k) Carried on a systematic and continuous plan of misrepresentation and slander of and concerning plaintiff and its business for the purpose and with the intent to undermine, impair, and ruin plaintiff's good will, business and earnings in breach of their duties aforesaid.

That during all of the time herein mentioned, and up to the 5th day of November, 1940, the defendants concealed from the plaintiff and its stockholders said acts of fraud and breach of duty and violations of his authority, and continued to draw the salary from plaintiff's treasury agreed to be paid by the plaintiff for the faithful and honest performance of his duties as plaintiff's managing agent; and to falsely state and represent, and hold himself out to plaintiff's stockholders and his associate directors as actively, consistently and continuously attending solely to the business of the plaintiff and to acting for it and its advantage in all his trips and activities. He visited various sections of Canada and the United States during said period of time and unlawfully embezzled plaintiff's funds by charging the expenses incurred by him on such travels to plaintiff and paid such expenses with money belonging to plaintiff, on the false and fraudulent representations that said payments were made by him to pay legitimate expenses in- [fol. 17] curred by him for the welfare of plaintiff and its business, while knowing that he was then and there, and on all of said trips and travels, engaged in inducing shippers of freight to divert their business from plaintiff to himself in all cases of shipments into the United States through Noyes as the port of entry, all in wilful violation of his authority and in wrongful breach of duty as plaintiff's executive officer and managing agent.

X

That by said wrongful and unlawful acts committed by the defendants, the entire capital, surplus, property, earnings and business of the plaintiff has been destroyed, the stock of plaintiff and its stockholders rendered worthless, and all of plaintiff's profitable business has become transferred to, and appropriated by, the defendants to their own name and use; and the defendants are now in possession and control of plaintiff's business, and of the income, money, earnings and profits therefrom and which in equity and good conscience are the property of this plaintiff.

XI

That by reason of the premises aforesaid the business now conducted by the defendants and all income and profits therefrom are in law and equity plaintiff's business and income, held and possessed by the defendants in trust for the use of the plaintiff and its stockholders.

[fol. 18]

XII

That the dates, details and circumstances whereby said defendants and their confederates have converted plaintiff's business and income into the name of defendant Jensen cannot be alleged with more particularity or detail because the records, books and papers pertaining to the transactions whereby said fraud was executed have been spirited away or taken by the defendants, as plaintiff is informed and believes, and are not now accessible or to be found although they have been seasonably and properly demanded to be returned to plaintiff's office, and by reason thereof the detailed information of said conversion of plaintiff's business and income by the defendants to their own use will have to be made hereafter pursuant to such legal rights as plaintiff may have to compel production of such records.

That the defendants, as plaintiff's trustees, have received and now receive and take in for the use of the plaintiff, a gross income as customhouse brokers, as plaintiff is informed and believes, $100.00 per day; that said income realized by defendants from the conduct of plaintiff's business, converted and fraudulently possessed by them, as aforesaid, is derived from operating plaintiff's brokerage business in the name of the defendant Jensen, in violation of his said agreement and of the duties and authority granted to defendant Jensen by the plaintiff; and the aggregate of the amount of money so withheld from plaintiff [fol. 19] and fraudulently converted by the defendants, to their own use as plaintiff is informed and believes, is $50,000.00. That the defendants in violation of the duties and agreements aforesaid take in, as trustees of the plaintiff, fees and compensation for the use of plaintiff on the average $50.00 to $100.00 a day; and that all thereof is received and held by the defendants in trust for the plaintiff. That said money and compensation is wrongfully received and disposed of by the defendants as their own income and is by them deposited to the credit of the defendants or to the credit of

persons unknown to the plaintiff in banks unknown to the plaintiff and wrongfully kept by defendants for their use. That all of said wrongs have been done by the defendants while pretending and representing falsely that they have been serving this plaintiff as its officers and agents.

That the defendants intend to, and will, unless restrained from so doing by this court, invest and so dispose of plaintiff's said business and income that all thereof will be concealed from and lost to the plaintiff whereby the plaintiff will be unable to recover any thereof. That it is the intention and plan of the defendants to defraud, cheat and deprive the plaintiff of its aforesaid money, property and income by the means aforesaid, and to permanently convert plaintiff's business to their own use.

That while the defendants carry on plaintiff's business [fol. 20] in the name of the defendant Jensen at and from Noyes, Minnesota, the defendant Jensen keeps himself concealed to escape plaintiff's demands for accounting and to avoid the service of process, all with the wrongful and unlawful intent to accomplish the appropriation of all money belonging to the plaintiff to the use of the defendants, and to cheat and defraud the plaintiff and its stockholders thereof.

XIII

That plaintiff's money, income and property acquired by and in the possession of the defendants have been invested, as plaintiff is informed and believes, by the defendants in their own name, or in the name of the defendant Jensen; that the record and account thereof is kept not in the plaintiff's books of account as they should be, but in books provided for and kept by defendant Jensen and said last mentioned books of account, records, and correspondence are concealed and withheld from this plaintiff.

That the books of account kept by the defendants in their own name disclose, as plaintiff is informed and believes, the amount of money taken in and the business done by the defendants in their own name for the use of the plaintiff, and that said books and records have been substituted by the defendants for the books provided by the plaintiff to be kept by the defendant Jensen for the plaintiff pursuant to [fol. 21] said agreement of September 6, 1938. That the defendants refuse plaintiff access to the records and books now kept by them in furtherance of said conspiracy, and

to effect said fraud and conversion; and plaintiff is the equitable owner of said books and records.

That the defendants have made many investments to their credit but such investments have been made with money belonging to the plaintiff, and by reason thereof the plaintiff is the true and equitable owner of all such investments. That said properties, as plaintiff is informed and believes, are situated principally in the village of Portal, North Dakota; that moneys taken in by the defendants have been deposited in several banks unknown to plaintiff with the intent to conceal from and deprive the plaintiff of the amount of such money and of the records of investments made for the use of the plaintiff. That the defendants refuse to account for said earnings and profits and also refuse to disclose the records kept by them of the money secured by them in violation of their duty; and the plaintiff is unable to discover and does not know, a more detailed description of the assets and money belonging to it; but the defendants have all of said records in their possession and under their control.

XIV

That because defendant Jensen violated his instructions and authority after acquiring control of plaintiff and its [fol. 22] business, effected by the means aforesaid, and because of his breach of duty as the trustee of plaintiff and its stockholders in perverting the management of plaintiff's affairs for his own advantage and to the great loss of the plaintiff and its stockholders the interests of the defendants are and have been since January 1, 1939, inimical to, and in conflict with, those of this plaintiff and its other stockholders, and by reason thereof this plaintiff and its stockholders, other than defendant Jensen, have had no notice, information or knowledge of the wrongs herein complained of until the same was disclosed to it on or about the 5th day of November, 1940; and on said last mentioned occasion plaintiff promptly demanded the resignation of defendant Jensen as plaintiff's manager, and also demanded of him that he state and render his account of the business done by him and pay over the money taken in by him in violation of his trust in the premises; that defendant Jensen resigned as manager but refused to state and render his account and refused to pay over to plaintiff said income, but continued to do business in his own name in violation

of his authority and in wilful breach of his duties and agreement.

XV

That plaintiff has no adequate remedy at law.

For its second cause of action plaintiff alleges:

[fol. 23] I

That it incorporates, and makes a part of this its second cause of action the allegations of paragraphs I to XIV both inclusive, to the same extent as if said allegations were herein re-alleged word for word.

II

That on January 10, 1940, plaintiff's board of directors declared a cash dividend and ordered said cash dividend to be paid forthwith, pursuant to which declaration Mrs. Annie Kramer and Mrs. Nan W. Anderson, stockholders were declared to own and to be entitled to receive money from the plaintiff as their dividends in the amount of $2,540.64 each. That the defendant Jensen was then and there president and treasurer of the plaintiff. That said dividends were ordered paid from profits realized on plaintiff's business during 1939, notwithstanding the defendant's wrongful acts aforesaid; that it was then and there the duty of the defendant Jensen to pay said dividends from the funds of the plaintiff under his control as plaintiff's treasurer and president; that sufficient funds were available to allow the payment of said cash dividends. That the defendant Jensen was allowed a cash dividend in the sum of $1,693.77 on account of the 25 shares given to him in consideration of his agreement to act as plaintiff's managing agent as herein alleged. That the dividend allowed to defendant Jensen was by him paid in full.

[fol. 24] That in breach of his duties, the defendant Jensen, failed and omitted to pay the dividends allowed to said Mrs. Anderson and Mrs. Kramer. That he did on the contrary wrongfully, unlawfully and fraudulently withhold the payment of said dividends to said Mrs. Anderson and Mrs. Kramer, and appropriated therefrom to his own use the sum of $2,000.00 as plaintiff is informed and believes, out of the amount of dividends allocated to said Mrs. Anderson and Mrs. Kramer, and paid to them the remainder. That

no part of said $2,000.00 has been paid to them, though payment thereof has been duly demanded and though said sum was due to them absolutely.

III

That the said Nan W. Anderson and Annie Kramer have duly assigned their aforesaid cause of action against the defendants to this plaintiff, and plaintiff is now the owner and holder of said claim, and entitled to the payment of said $2,000.00 with interest thereon at the rate of six per-cent per annum from January 10, 1941.

Wherefore, plaintiff demands judgment against the defendants as follows:

1. For a decree adjudging that the defendants now hold and use and have held and used since September 6, 1938, the license of customhouse broker, issued to the defendant Norman G. Jensen, in trust and for the use and benefit of [fol. 25] the plaintiff, and that all acts and all services rendered by him and under his direction, and all earnings and income resulting from the use and exercise of said license in the name of Norman G. Jensen, by him directly and by his agent, defendant Rhime, have been done and have accrued and enured as a trust to the credit of the plaintiff, and that all authority and power exercised by the defendant Rhime as attorney in fact for the defendant Jensen in said business of customhouse brokerage at Noyes, Minnesota, have been done and have enured to the credit of the plaintiff, and that the plaintiff is now and has ever been the owner of the income, money and profits derived from and in the said customhouse brokerage business carried on by the defendants at Noyes, Minnesota, under and by virtue of said license standing in the name of the defendant Norman G. Jensen.

2. That an account be taken, under the direction of this court, of the income and profits taken in and realized by the defendants from the customhouse brokerage business at Noyes, Minnesota, conducted by them in the name of Norman G. Jensen since January 1, 1939, to the date of the commencement of this action, and that the amount of profits found in said accounting to have been realized therefrom during said time, without crediting the defendants with any salary or other compensation, but crediting them [fol. 26] with the amount of dividends actually paid and

distributed on January 10, 1940, be adjudged to be and to have been impressed with the trust, and to be held by defendants as a trust fund, for the use and benefit of this plaintiff, and adjudging that the amount thereof, with interest thereon at the rate of six percent per annum figured on each monthly balance thereof, is due to and owned by the plaintiff.

3. That the amount found due on such accounting be adjudged to be paid by the defendants to the plaintiff, and that any and all property held by the defendants as property obtained by them by the use of any of such funds shall be adjudged to be the property of this plaintiff and held by the defendants in trust for the plaintiff and to be by the defendants, duly assigned, transferred and conveyed to the plaintiff as in said decree may be adjudged, including the rents and profits from any such trust property.

4. That the defendants and each of them, their agents and attorneys, be in the meantime enjoined from transferring, assigning, pledging, encumbering, giving away or otherwise disposing of all money and property possessed by them or under their control.

5. That the defendants be adjudged to assign and deliver to the plaintiff 25 shares of plaintiff's capital stock, and [fol. 27] the certificate therefor and adjudging that they have no title or interest in said shares of stock

6. That defendant Norman G. Jensen has forfeited all rights to compensation from the plaintiff and that he be adjudged to restore to plaintiff all moneys received or withdrawn by him from the treasury of the plaintiff, together with interest thereon at six percent per annum from the date of each withdrawal including withdrawals as "salary and expenses" made since January 1, 1939, and that plaintiff recover judgment against the defendants for the amount thereof.

7. That the defendants be adjudged to account to plaintiff for all moneys received during the pendency of this action and that the amount thereof be adjudged to be paid over to plaintiff.

8. That it have judgment for $2,000.00 against defendants for withholding and embezzling $2,000.00 of money due

and payable to Mrs. Nan W. Anderson and Mrs. Annie Kramer and assigned to the plaintiff.

9. That plaintiff be adjudged to recover general damages from the defendants in the sum of $25,000.00; and

10. That plaintiff be awarded and adjudged such further and additional relief as to the court may seem just and [fol. 28] equitable and that it recover its costs and disbursements in this action.

Dated June 7, 1941.

Leonard Eriksson and James S. Eriksson, Fergus Falls, Minnesota. Lewis L. Drill and Lawrence Applebaum, Commerce Building, St. Paul, Minnesota, Attorneys for Plaintiff.

PLAINTIFF'S EXHIBIT "A"

I, Norman Gilbert Jensen, in consideration of receiving twenty-five (25) shares of the capital stock of the Union Brokerage Corporation of Portal, North Dakota, do hereby agree to turn over to the Union Brokerage Corporation all my right, title and interest in the customs brokerage business now conducted by me or under my name. I do hereby agree that all brokerage business in the future will be conducted under the name of and for the sole benefit of the Union Brokerage Company, a corporation of North Dakota, that I will not at any time engage privately or otherwise in any business that would compete with the general business and purpose of the Union Brokerage Company; I do hereby further agree not to hold or acquire any interest whatsoever, stock or otherwise in any other Broker or [fol. 29] Brokerage Company, which will compete with the Union Brokerage Company.

I do further agree to use my very best efforts to conduct the Union Brokerage Business for the benefit of the corporation, its officers, directors and stockholders; to give the daily conduct of its business my full time, best efforts and energy, and to operate and conduct said business in full compliance with the minutes and by-laws of the Union Brokerage Company.

It is understood that in consideration of the above stock

being issued to me and my wife as joint tenants, said stock is all fully paid, I will further give the officers and directors my full cooperation at all times, and will conduct said business with the full faith herein placed in me and will not at any time violate or take advantage of the fiduciary relationship which I now occupy by reason of my office in said corporation.

Norman G. Jensen.

Witnessed this 6th day of September, 1938. M. Carlson, H. O. Kramer. (Complaint duly verified.)

[fol. 30] In District Court of Kittson County

Separate Answer of Norman G. Jensen—June 30, 1941

Comes now the defendant, Norman G. Jensen, and for his separate answer to plaintiff's first cause of action alleges and shows to the court:

1.

Admits the allegations in paragraph I of plaintiff's first cause of action, but in that relation this defendant states that he is informed and believes, and, therefore, states the fact to be, that the plaintiff corporation is not now, and never has been, authorized to transact business within the state of Minnesota as a foreign corporation;

2

Denies that the defendants, Jensen and Rime, have been, and now are, engaged in the custom house brokerage business at Noyes, Minnesota, or elsewhere, under the name and style of "Norman G. Jensen, Custom House Broker," and in that relation alleges the fact to be that this answering defendant, Jensen, is now so engaged, and has been so engaged for some time last past, and that the defendant, Rime, is employed by him in his said business;

Admits that the answering defendant, Jensen, is a licensed customhouse broker, and admits that the defendant, Rime, is in his employ.

Admits that the defendant, Jensen, for reasons of business and convenience, has executed a power of attorney [fol. 31] to the defendant, Rime, to act in his name and

stead in and about the business of the defendant, Jensen, at Noyes, Minnesota;

Denies that the license issued to the defendant, Jensen, as a custom house broker, or the use thereof, was ever assigned to the plaintiff, and asserts that said license is not assignable, as the plaintiff at all times well knew;

Denies that the defendant, Jensen, is now or has ever used his said license in breach of any contract with the plaintiff, or in violation of any duties devolving upon the defendant, Jensen, in his relations to the plaintiff;

3

As to the allegations contained in paragraph 3 of plaintiff's first cause of action, this answering defendant admits that the plaintiff corporation has an authorized capital of ten thousand dollars ($10,000.00), but as to the present distribution of said stock, and as to who are the officers and directors thereof he has no knowledge or information sufficient to form a belief, and, therefore, denies the same;

4

Concerning the allegations contained in paragraph 4 of plaintiff's first cause of action, this defendant states that he has no knowledge or information sufficient to form a belief as to whether plaintiff's business was, or was not profitable prior to his connection therewith, and, therefore, denies the same;

[fol. 32]

5

As to the allegations contained in paragraph 5 of plaintiff's first cause of action, this answering defendant states that he has been informed that plaintiff corporation was organized by one Carl Anderson and one Henry J. Kramer, both of whom are now deceased;

Denies that one H. O. Kramer, sometimes known as Harry O. Kramer, was one of the organizers of said corporation as therein set forth, and alleges that said H. O. Kramer is a son of the said Henry J. Kramer, deceased; that as to how and to whom the stock of the deceased, Anderson and Kramer, was assigned, this defendant has no sufficient knowledge or information upon which to form a belief, and, therefore, denies the same, and puts plaintiff upon its proof;

6

This answering defendant admits that for some time prior to the sixth day of September, 1938, he carried on the business of custom house broker as an individual in competition with the plaintiff corporation at Portal, in the state of North Dakota, and nowhere else;

Denies that on or about the sixth day of September, 1938, he entered into an agreement with the plaintiff corporation, as alleged in paragraph 6 of plaintiff's cause of action, by the terms of which the business of the plaintiff and this answering defendant were merged to be conducted thereafter by the defendant, Jensen as plaintiff's managing [fol. 33] agent; and in that relation alleges the facts to be, that at or about said time this defendant sold his said business as a custom house broker at Portal, North Dakota, to the plaintiff, and received as consideration therefor twenty-five shares of the capital stock in plaintiff corporation, fully paid, and that thereupon, or thereafter this answering defendant was employed by the plaintiff at a fixed salary, and for the purposes of business and convenience was appointed and elected to certain offices in said corporation;

Denies that by the terms of any agreement this defendant, Jensen, agreed with plaintiff that he, the said Jensen, would cease to carry on business as a custom house broker; would assign his rights to plaintiff; would cease doing business as an individual custom house broker, and conduct the business of custom house brokerage exclusively in plaintiff's name, and solely for its use; and in this relation alleges the facts to be, that the defendant sold to plaintiff, in consideration of twenty-five shares of the capital stock of plaintiff corporation, his individual brokerage business operated at Portal, North Dakota, as then owned, operated, and conducted by him, and not otherwise; that in connection therewith this defendant, Jensen, agreed to conduct said business in the name of the plaintiff thereafter as an employee of the plaintiff, and that he, the said Jensen, did not thereafter engage in the business of individual custom house broker, or [fol. 34] otherwise, as a competitor of the plaintiff at Portal, North Dakota, solely and only;

7

Answering paragraph 7 of plaintiff's first cause of action, this defendant admits that plaintiff's board of directors was

constituted as therein alleged, but denies each and every other matter, and thing in said paragraph alleged;

8

With reference to the allegations set forth in paragraph 8 of plaintiff's first cause of action, this defendant admits upon his employment by the plaintiff corporation, and his election to certain offices in the plaintiff corporation, he agreed to perform the customary and usual duties of the holders of such offices which might thereupon devolve upon him by virtue of said offices, but otherwise denies each and every allegation, matter, and thing in said paragraph 8 of plaintiff's first cause of action;

9

Answering the allegations set forth in Paragraph 9 of plaintiff's first cause of action, this answering defendant denies each and every allegation, matter, and thing therein contained;

Further answering, this defendant states that at no time prior to defendant's resignation as an officer and employee of the plaintiff corporation was this plaintiff engaged in business as a custom house broker at Noyes, in the State of [fol. 35] Minnesota, and alleges that the business of the defendant as a custom house broker at Noyes, in the State of Minnesota, did not, and by reason of the nature thereof could not, compete with the business of the plaintiff as a custom house broker at Portal, North Dakota;

Denies that any competition between the plaintiff and defendant took place as such custom house brokers until after the defendant had severed his connection with the plaintiff corporation, and until the plaintiff corporation and its officers and directors, conniving with one William Mackay and one Fraser Mackay, established a business as custom house broker at Noyes, in the State of Minnesota, with the intent and purpose of competing with this defendant, and in order to harass and annoy the defendant, and to destroy his said business; and in this relation this defendant alleges that after he had established his business as a customhouse broker at Noyes, in the State of Minnesota, the plaintiff corporation and its officers and directors, and particularly Nan W. Anderson, Annie Kramer, and Harry O. Kramer, conspired and confederated with one William Mackay and

one Fraser Mackay, both of Noyes, Minnesota, to wreck and destroy the defendant's said business, and in furthering said conspiracy caused some of the stock of plaintiff corporation to be placed in the name of said William Mackay and said Fraser Mackay, so as to qualify them, the said [fol. 36] William Mackay and the said Fraser Mackay, to act as directors of said corporation, and then elect, or pretend to elect, the said William Mackay and the said Fraser Mackay, and each of them, as such directors;

That in carrying out said conspiracy the plaintiff corporation, and its officers, or some of them, together with the said William Mackay and Fraser Mackay, established a business as custom house broker at Noyes, in the State of Minnesota, in competition with the said defendant, under the management of the said William Mackay and the said Fraser Mackay;

That in furtherance of said conspiracy and such purpose the above named persons have ever since said time engaged in every form of unfair competition that they are capable of devising and which the circumstances permit, including the writing of slanderous communications to defendant's customers and clients, and to custom and railroad representatives and officials, and slashing and cutting of fees, and the making of derogatory statements with reference to the defendant and his business, and his business methods, all to defendant's great damage.

10

Answering the allegations set forth in Paragraphs 10, 11, 12, 13, 14, and 15 of plaintiff's first cause of action, this answering defendant denies each and every allegation, mat- [fol. 37] ter, and thing therein set forth;

Further answering, this defendant states that if the records, books, and papers of the plaintiff corporation have been concealed, destroyed, or spirited away, as alleged therein, the concealing, destruction, and spiriting away thereof was done without the knowledge, or consent, or participation of this answering defendant, and was contrary to his wishes and his interest; that upon being informed of the alleged concealment or removal of such records from plaintiff's office this answering defendant instituted a search therefor in connection with the public authorities of Burke County, North Dakota; that this an-

swering defendant has reason to believe that the alleged disappearance of such records was brought about by some person or persons connected with the plaintiff corporation other than this defendant, for the purpose of covering up and concealing wrongful transactions of said person or persons, other than this defendant, then connected with or employed by said corporation;

11

Save and except as hereinbefore admitted, qualified, or modified, this answering defendant denies each and every allegation, matter, and thing in plaintiff's said first cause of action.

Comes now the above named defendant, Norman G. Jen- [fol. 38] sen, and for his separate answer to plaintiff's second cause of action alleges:

1

That as to Paragraph 1 of plaintiff's said second cause of action, this answering defendant re-alleges and makes a part of this answer all of the allegations contained in Paragraphs 1 to 11, inclusive, of defendant's answer to plaintiff's first cause of action, to the same extent and with the same force and effect as if said allegations were herein re-alleged verbatim;

2

Answering Paragraph 2 of plaintiff's second cause of action, this answering defendant denies the same and alleges the facts to be that Mrs. Annie Kramer and Mrs. Nan W. Anderson, stockholders of plaintiff corporation, described therein, during the time and period set forth therein received all dividends either declared or to which they were entitled as stockholders from such corporation, and denies that this defendant at any time failed or omitted to pay to the said Mrs. Anderson and the said Mrs. Kramer any and all dividends to which they were then or at any time entitled;

3

Answering Paragraph 3 of plaintiff's second cause of action, this answering defendant states that he has no knowl-

edge or information sufficient to form a belief as to the truth thereof, and, therefore, denies the same.

[fol. 39] Wherefore, This defendant prays for judgment and decree of this court,

First: That the plaintiff take nothing by its first cause of action, or its second cause of action, or either of them, and that they, and each of them, and plaintiff's said complaint may be in all things dismissed.

Second: That he have and recover of and from the plaintiff his costs and disbursements herein.

Third: That he have and recover such other relief as to the court may seem just and equitable in the premises.

Dated this 30 day of June, 1941.

Robert W. Palda, Minot, North Dakota; Francis Murphy, Fargo, North Dakota, Attorneys for the Defendant.

(Answer duly verified.)

In District Court of Kittson County

Separate Answer of Curtis M. Rime—June 30, 1941

Comes now the above named defendant, Curtis M. Rime, and for his separate answer to plaintiff's first cause of action in its complaint alleges and shows to the court:

1

Admits that he has been and is now employed by the defendant, Norman G. Jensen, in the business of the said defendant, Jensen, acting as a custom house broker at [fol. 40] Noyes, in the State of Minnesota, and that pursuant to such employment, and as a matter of convenience and necessity, has received, and acts under, a power of attorney, made, executed, and delivered by the defendant, Jensen as a licensed customhouse broker, to this answering defendant as his attorney in fact, authorizing this answering defendant to act as such broker in the name and stead of the defendant, Jensen, operating as such licensee at Noyes, in the State of Minnesota;

Save and except as thus admitted this answering defendant denies each and every allegation, matter, and thing in plaintiff's said first cause of action.

Answering plaintiff's second cause of action, this answering defendant, Curtis M. Rime, alleges:

1

Re-alleges the denials and allegations herein set forth to plaintiff's first cause of action, the same as though the same were set out herein verbatim:

2

Denies each and every allegation, matter, and thing in plaintiff's said second cause of action.

Wherefore, This answering defendant demands judgment,

First: That the plaintiff take nothing by its first cause of action or by its second cause of action, and that the same, [fol. 41] and each of them, and the plaintiff's complaint may be in all things dismissed.

Second: That he shall recover from the plaintiff his costs and disbursements herein.

Third: That he have such other and further relief as the court may deem just and equitable in the premises.

Dated this 30 day of June, 1941.

Robert W. Palda, Minot, North Dakota; Francis Murphy, Fargo, North Dakota, Attorneys for the Defendant.

(Answer duly verified.)

In District Court of Kittson County

Reply to Separate Answer of Defendant Norman G. Jensen

For its reply to the separate answer of the defendant Norman G. Jensen, plaintiff alleges:

I

With reference to paragraph I, it alleges that it has at all times been a corporation organized and empowered to

transact business as a customhouse broker within customs district #34 of the United States of America, and said district embraces within its boundaries a part of the State of North Dakota and that part of the State of Minnesota in which Noyes is located. That its license as a customhouse broker is now, and has been, during all of the times here- [fol. 42] in involved, effective for and throughout said customs district #34. That the defendants and each of them, have at all times herein involved known and appreciated that the plaintiff has been at all times authorized to do business as a customhouse broker throughout said district #34.

In that connection plaintiff further alleges that it could and would have operated and transacted its aforesaid authority and powers as a licensed customhouse broker at Noyes, Minnesota, but for the fraudulent and wrongful conspiracy executed by the defendants as alleged in plaintiff's complaint.

That the defendants have at all times known and understood that plaintiff could and would have conducted openly its business as customhouse broker at Noyes, Minnesota, but for the wrongful breach of duty by defendant Jensen, aided and abetted by defendant Rime, as alleged in plaintiff's complaint.

And plaintiff further alleges that the laws of the United States of America governing the plaintiff as a licensed customhouse broker within and for said district provide:

> "Art. 1396. License For More Than One Customs District. Separate licenses shall be required if the licensee desires to transact business in more than one customs district. However, a licensee having a license in force in one district may on application to the Committee be granted a license to transact business in [fol. 43] another district without further examination, provided it appears on investigation that the licensee is authorized to do business in the State or States in which such other district is situated, and is prepared and qualified to render efficient service in such other district. Licenses may be granted to partnerships with two licensed members, and to corporations and associations with two licensed officers, whether or not such members or officers are licensed in the district for which the partnership, corporation, or association license is granted."

and the rules of the United States Treasury Department made pursuant to the Tariff Act of 1930, as amended, and in force and effect during the times involved in this action, among other things provide:

> "Art. 1398 (subdivision u.) Every licensed officer or member of a corporation, association, or partnership, which is licensed as a customhouse broker shall exercise responsible supervision and control over the transaction of the customhouse business of such corporation, association, or partnership."

That plaintiff elected the defendant Jensen as alleged in its complaint, to its said offices of trust and thereupon entrusted to him the duty of responsibly supervising and [fol. 44] controlling its customhouse business within said district #34 to insure the requirements of said law and rules; and the defendant Jensen knowingly and understandingly accepted said offices subject to said rules and law, and to that end agreed to let and assign to plaintiff the exclusive use of his individual license as a customhouse broker in his said capacity of its managing agent.

II

With reference to the allegations of defendant Jensen as to plaintiff's books, the plaintiff alleges that the laws and regulations of the United States in force and effect during the times involved in this action provide:

> "Art. 1392 (e) The term 'books and papers' includes all books, accounts, records, papers, documents, and correspondence of a customhouse broker relating to his customhouse business," and
>
> Art. 1395 (b) Each licensed customhouse broker shall maintain correctly and in orderly, itemized manner, and keep current records of account reflecting all his financial transactions as a customhouse broker. He shall keep and maintain on file a copy of each entry made by him, and copies of all correspondence and other papers relating to his customs business," and
>
> [fol. 45] (g) "All of the books and papers required by the foregoing provisions of this article shall be kept on file for at least five years and maintained in such manner that they may readily be examined. Any

or all of such books and papers shall be made available to duly accredited agents of the United States on demand therefor within five years after their preparation or receipt by the broker, or within such longer period of time during which they remain in the possession of the broker. The broker shall also furnish such additional information regarding his activities as a licensed customhouse broker as such agents may require.

That on accepting said offices of the plaintiff mentioned in its complaint herein, it became and was ever the duty of the defendant Jensen while in possession of said customhouse business as plaintiff's managing agent, to obey and observe said law and rules; that plaintiff entrusted to him its aforesaid books and records on or about September 6, 1938, and since said last mentioned date the defendant Jensen has had the absolute control and the exclusive possession of the plaintiff's aforesaid books and records. That plaintiff's said books and records have not been surrendered or returned to it but are now in his possession and under his control as alleged in plaintiff's complaint. That plain-[fol. 46] tiff has not consented to, nor approved, knowingly or otherwise, of their surrender, loss or destruction nor of their deposit with any attorney or other person or in any office other than its own.

III

Except as herein explained, plaintiff denies each and every allegation of new matter in said answer contained.

Wherefore plaintiff renews its prayer for relief as prayed for in its complaint in this action.

Leonard Eriksson and James S. Eriksson, Fergus Falls, Minnesota; Lewis L. Drill, Commerce Building, St. Paul, Minnesota, by Leonard Eriksson, Attorneys for Plaintiff.

(Reply duly verified.)

IN DISTRICT COURT OF KITTSON COUNTY

REPLY TO SEPARATE ANSWER OF DEFENDANT CURTIS M. RIME

The Plaintiff for its reply to the separate answer of defendant Curtis M. Rime, denies each and every allegation of new matter contained in said answer.

[fol. 47] Wherefore plaintiff renews its prayer for the relief prayed for in its complaint in this action.

Leonard Eriksson and James S. Eriksson, Fergus Falls, Minnesota; Lewis L. Drill, Commerce Building, St. Paul, Minnesota, by Leonard Eriksson, Attorneys for Plaintiff.

(Reply duly verified.)

IN DISTRICT COURT OF KITTSON COUNTY

Transcript of Testimony

The above entitled action being upon the Calendar for the November, 1941, Regular Term of said Court, came on for trial before the Hon. Oscar R. Knutson, a Judge of said Court, without a jury, by consent of the parties, on the 8th day of December, 1941, at the courtroom in the Courthouse, in the Village of Hallock, in the County of Kittson and State of Minnesota.

Leonard Eriksson, Esq., and James S. Ericksson, Esq., of Fergus Falls, Minnesota, appeared as Attorneys for the plaintiff.

Francis Murphy, Esq., of Fargo, North Dakota, Robert W. Palda, Esq., of Minot, North Dakota and A. D. Barnemann, Esq., of Hallock, Minnesota, appeared as Attorneys for the defendants.

[fol. 48] The following proceedings were then had:

The Court: You may proceed.

Mr. Murphy: I assume, if Your Honor please, that this is the proper time to make an objection here that we desire entered in the record. Matter has been placed in issue in the answer and, in other words, we question the authority of this corporation, which the complaint alleges is a foreign corporation, that is, a North Dakota corporation, to sue in the Courts of Minnesota under the foreign corpora-

tion statute of this State by reason of their failure to procure a certificate of authority and we desire at this time to file with the Court the certificate of the Secretary of State, Mr. Mike Holm, showing that to be the fact that no certificate of authority has ever been issued, and I call your attention to the Minnesota Statute which provides in terms that no foreign corporation transacting business in this State without a certificate of authority shall be permitted to maintain an action in any Court of this State until such corporation shall have obtained a certificate of authority.

Mr. Eriksson: If the Court please, if there is any argument on this or any other similar point in the case James Eriksson will argue the law but I don't think that it needs any argument on that point at this time because clearly this is a corporation engaged in interstate commerce.

[fol. 49] The Court: Well, I'll be glad to hear your arguments on this if you wish to submit it.

Mr. James Eriksson: I think it may be conceded that the plaintiff corporation has not secured a certificate of authority to do business in this State. The position of the plaintiff is this, your Honor, that the statute in question does not apply to the plaintiff corporation for the reason that the plaintiff is engaged in interstate commerce and that the statute is not intended to apply to corporations such as this plaintiff. (Further argument omitted.)

The Court: Well, the question is sufficiently doubtful so that I shall reserve the ruling on it at this time and you may proceed with the evidence.

We will take a ten minute recess at this time.

(Morning recess.)

The Court: Do you wish to be heard on this matter, Mr. Murphy?

Mr. Murphy: As I understand it you have reserved your ruling?

The Court: Yes. I think the record should show, however, that you have submitted the certificate as a part of your motion and that it is received in evidence.

Mr. Murphy: I ask that the record so show.

The Court: Very well.

Mr. Eriksson: At this time we will call the defendant, Mr. Jensen, for cross-examination under the statute.

[fol. 50] NORMAN G. JENSEN, one of the defendants, called by the plaintiff for cross-examination under the statute, and being first duly sworn testified as follows:

Cross-examination under the statute.

Mr. Eriksson:

Q. Your name is Norman G. Jensen?
A. Yes.
Q. And you are one of the defendants in this case?
A. I am.
Q. You are residing at Portal, North Dakota, are you?
A. Yes.
Q. And at the present time you are interested in a business at Noyes, Minnesota, the name of which I believe is "Norman G. Jensen, Customhouse Broker"?
A. I am.
Q. That is located at Noyes, Minnesota?
A. It is.

. . . . . .

[fol. 51] Q. And then sometime in 1937 you got a license as a Customhouse Broker—can you give me the date of that license?
A. The license is dated some date in March, 1937.
Q. Have you got that license here?
A. No, I don't have it here.
Q. And you have maintained a license or had one renewed each year, have you?
A. We don't have to have it re-newed each year.
Q. Then your testimony is that that license originally obtained by you is the license that has been in force continuously since that time?
A. That's right.
Q. That license was issued by the United States Treasury Department?
A. Yes.

. . . . . .

[fol. 52] Q. And you either learned or knew when you arrived that the Union Brokerage Company had been conducting a business as a Customhouse Broker for several years at least, prior to the time of your coming?

A. Yes.

Q. Incidentally, what is the first place at which you had done any business under your license, Portal?

A. Yes.

[fol. 53] Q. At the time that you arrived to begin your own business as a Customhouse Broker, in Portal, North Dakota, the Union Brokerage Company, had its offices in Portal and it was managed by M. V. Carlson and H. O. Kramer, is that right?

A. M. V. Carlson was president of the company——

Q. Yes——

A. H. O. Kramer had some connection——

Q. Well, you knew that they were connected with it and conducting the business for the plaintiff under some authority?

A. Yes.

Q. That is what you learned at the time and knew at the time, is that right?

A. That's right.

Q. Did you then know or did you later find out that the controlling stockholders of plaintiff corporation were Mrs. Nan W. Anderson and Mrs. Annie Kramer?

A. I don't know when I found that out; I don't remember.

. . . . . .

[fol. 54] Q. The business of customhouse brokerage is a business which is engaged in or which may be engaged in only by persons having a customhouse brokers license issued by the treasury—United States Treasury Department, is that right?

A. There are some exceptions but technically speaking we can say that is true.

Q. The exceptions to which you refer are exceptions stated in the law itself, are they?

A. That's right.

Q. And they apply, for example, to a person having a Power of Attorney, that is one exception?

A. That's right.

Q. And he can have or enjoy such a Power of Attorney only on condition that the grantor of that power himself has a license?

A. Not necessarily.

Q. Well, the law will speak for itself. Now, a Customhouse Broker may be defined, may it not, to be a person, whether an individual, a partnership, an association or corporation, who, acting on behalf of others, transacts customs business not exempted or limited by the Act of Congress for the protection of importers and the revenue of [fols. 55-58] the United States in execution of the Tariff Act in force? If you want that read the reporter will read it.

(Question read, line 21 to 27, P. 19)

A. Yes.

Q. The plaintiff, within your understanding, was such a licensed broker in 1937 and 1938?

A. Yes.

Q. And you yourself were such a broker?

A. From the date that I received my license in 1937.

Q. Yes. In the case of a corporation such as the plaintiff its own license, you know, would be of no avail or benefit to it unless at least two of its officers were individually licensed?

A. It couldn't have a license unless two officers were licensed.

Q. That's right—that's a better statement than mine, and where an emergency arises for one cause or another so that there is an interruption in the number of officers individually licensed or the number of officers individually licensed is reduced below two, say to one, then there is provided a grace period—a period of grace of 60 days for the corporation to supply another individual licensee?

A. That statement is correct.

• • • • • • •

[fol. 59] Q. Before you got a license to engage in the business of a customhouse broker, may I assume that you have made some study of these laws to acquaint yourself with the rules and regulations of the treasury department?

A. You may.

Q. And that is a fact?

A. That is a fact.

Q. And since that time, that is, since you entered upon the business under that license, you have, it is true, is it not, similarly tried to acquaint yourself with the rules and

regulations of the treasury department so that you have kept pace with the rules and regulations, is that right?

A. That's right.

• • • • • • •

[fol. 60] Q. The regulations under which you have conducted your business as a licensed customhouse broker, and during all the times that we are speaking of now in this case, required you as a licensed customhouse broker to keep true and accurate records of all financial transactions had, that's right, isn't it?

A. I don't remember all of your question.

(Last Question, line 11 to 15 read to witness.)

A. I kept true and accurate records of all transactions of all customhouse brokerage that I did.

[fol. 61] Q. And the law in force during all this time, according to your own understanding and knowledge, has required you to keep such records of financial transactions for at least five years from the date of each of them, isn't that right?

A. Yes.

• • • • • • •

Q. You understand the term "intra-state"; you understand that term?

A. Intra-state? It's within Minnesota.

Q. Yes. You, as a broker, have nothing to do with shipments that originate in Minnesota?

A. Not very often.

Q. Not at all, have you?

A. We might handle some that originate in Minnesota and go into Canada.

Q. Well then, in those cases it is in relation to commerce between Canada and Minnesota as a part of the United States?

A. That's right.

Q. In other cases, as a rule, the business in which the customhouse broker deals originates, as a rule, in a foreign [fol. 62] country or in some cases originates in the United States and is transported—that is, originates in some other state than Minnesota and is transported in bond through Canada and down into the United States?

• • • • • • •

A. I can't answer that question, Mr. Eriksson, either yes or no; you have two questions in there.

. . . . . .

[fol. 63] Q. In the other class of cases the broker serves, in the capacity authorized by law, importers whose shipments originate in Canada or some other foreign country and whose shipments of merchandise into the United States enter the United States through a port of entry in the district for which you have a license?

A. May I have that read? (Last Question, Lines 20 to 24 read.)

A. The question is so long and involved that I can't keep the continuity of it in mind. Would you mind putting it in smaller questions, please.

Mr. Eriksson: Alright——

Q. A great majority of shipments of merchandise into the United States, which come into the United States through the district in which you have a license, originate in Canada?

A. I don't know whether I have your question right or not; I'll try to answer it by making this statement: The majority of a broker's business is clearing shipments from Canada or some other foreign country shipped through a [fol. 64] port at which a broker is working into the United States.

Q. Alright. And in that capacity the licensed customhouse broker serves on one hand the importer and on the other hand the United States in the matter of seeing to it that proper revenue is collected or determined?

A. That may be so; I never thought of it in that connection; I wouldn't want to deny it; I wouldn't want to confirm it.

Q. In practice that is what is behind this provision of the Statute which I read previously: (reading) "The Secretary of the Treasury shall prescribe such rules and regulations as he may deem necessary to protect importers and the revenue of the United States". Isn't that right?

A. That's correct. It's printed right there (indicating).

Q. I mean this service that you have just explained is to carry out this provision in part, isn't it?

A. That's right.

Q. So that in as much as you have nothing to do with business moving from Noyes to Hallock or from Noyes to Minneapolis or other points in Minnesota, you are dealing, handling and examining clearances of goods that originate either in a foreign count-y or in some other state than Minnesota?

A. I can't answer that because you have two questions in there.

[fol. 65] Q. And so, to make this attempted investigation clear and simple, a customhouse broker is rendering services to both the government of the United States and the importer, isn't that right?

A. That's right.

Q. And that is all his business?

A. No, he renders service to exporters.

Q. All right; we'll add that to it—is that all of his services?

A. It is all I can think of right now.

* * * * * * *

Q. Now, this license that we have been talking about is granted to you and the plaintiff has a license for District Number 34, has it not?

A. That's right.

Q. And District Number 34 is a district of which the geographical limits—the geographical limits of which are the northern half of North Dakota and a substantial portion of the north half of Minnesota, isn't that right?

A. I don't think so.

[fols. 66-80] Q. Well, will you please tell us the geographical limits of District Number 34?

A. According to my recollection it is North and South Dakota and Kittson County, Minnesota, that may not be right but that is according to my recollection.

Q. Well, in any event, it includes Noyes with the rest of it—Noyes is in and included in District 34?

A. Noyes is in District 34.

Q. And Portal, North Dakota is in the same district?

A. Yes.

* * * * * * *

[fol. 81] Q. And going back to this business to talk about the services rendered a little bit—at Portal there is only one railroad coming to the town, isn't that right?

A. That's right.

Q. And that is the Soo in the United States?

A. Yes.

[fols. 82-83] Q. And the C. P. R. coming to the United States connecting with the Soo, isn't that right?

A. Sure.

Q. That is the only road serving Portal and over which shipments of merchandise into the United States, subject to services by the customhouse broker, could be had?

A. That's right.

Q. And in 1938, and for months afterwards, this business of importing merchandise from Canada into the United States over these roads continued to grow?

A. Yes; I went out and got more business.

[fol. 84] Q. You admitted this morning that you understood the law to be that every licensed customhouse broker would have to keep for at least five years a true and accurate financial record of his transactions.

A. That's right.

Q. And those financial transactions or records of those financial transactions would disclose in each instance the name of the exporter and the importer served by you or by a given licensed customhouse broker, isn't that right?

A. It wouldn't in every instances give the name of both; it would in every instance give the name of one or the other.

Q. Yes. Now, so that we understand your answer, let me divert enough to say this: that supposing we have a shipment of lumber from British Columbia routed over the C. P. R. to connect with the Soo at Portal, there are cases where the exporter in Canada would leave instructions with the shipment that the consignee or the importer would pay the dues, the fees, and the duty, isn't that right?

[fol. 85] A. That's right.

* * * * * * *

[fol. 86] Q. Alright—I'm showing you now a form which has been identified as Plaintiff's Exhibit D and ask you if that is not the form usually referred to and identified in the records of the Collector of Customs as Form No. 3079?

A. This is Customs Form Number 3079.

Q. And the rules and regulations of the Treasury Department required you, as a licensed Customhouse Broker and every other licensed U. S. Customhouse Broker, to

keep a true financial record on this form unless the particular broker were exempted, isn't that right?

A. That's right.

Mr. Eriksson: Now, I offer Exhibit D in evidence to show the nature of the records which the Customs Department of the United States Treasury require him and other licensed brokers to keep.

Mr. Murphy: No objection.

The Court: It may be received.

Mr. Eriksson:

Q. This form, Exhibit D, first requires the name of the broker, his address and the port of entry at which he is stationed, isn't that right?

A. That's right.

Q. And stopping for a moment—for every port of entry there is a port of exit, is that right—for Noyes, which is the port of entry, the corresponding port of exit is Emerson?

A. To the best of my knowledge your statement is correct.

[fol. 87] Q. And in the case of Portal, which is another port of entry in the United States, the port of exit is North Portal, isn't that right?

A. That's right.

Q. The next column (indicating) has reference to certain symbols that may or may not be of consequence here; I'll refer you to this second column "Symbol"——

A. That's obvious.

Q. Then the third column is "Date of Entry"; there is shown, is it not, the date on which a particular entry is made?

A. That's right.

Q. —by the Customhouse Broker?

A. If they use that particular form.

Q. If they use this form yes. The next column is described and divided into three parts and headed "Value of Merchandise"; the next one is likewise divided into four parts and is headed "Amounts Deposited With United States"; the next is "Amounts Refunded Payee by United States" and is divided into three parts; and so on down the line as shown in this schedule, isn't that right?

A. That's right.

Q. Now, the law provides and you know that to be true in practice, that a Customhouse Broker may be exempted from keeping his records in the detail and in the form prescribed or provided for in this Exhibit D, isn't that right?
[fols. 88-107] A. That's right.

Q. But in such a case the law requires—and you know that to be true in practice—that, if exempted, the licensed Customhouse Broker has to keep records equally complete?

A. The practice is that the broker who is exempted from this may keep records on any form that is o-kayed by the Special Agent.

* * * * * * *

[fol. 108] Mr. Eriksson: I now ask to have this list identified in this case.

(Plaintiff's Exhibit F marked for identification.)

Mr. Eriksson:

Q. Is that the list of shippers or clients with whom the Union Brokerage Company—whom they served as licensed Customhouse Brokers at Portal, North Dakota, while you were mangaer and which you sent in response to the demand for a list of clients and shippers served?

A. This (indicating) is three pages of such list; it may have been all of it.

Q. Well, I'm not asking you that now—if I did, pardon me; what I intended to ask you is this simple thing: is that the list which you made up and sent in response to Mr. Applebaum's request for a list of shippers and clients [fols. 109-111] served by the Union Brokerage Company?

A. I think this is a copy of that list; the original list as I made it out was attached to the front page of the general journal of the Union Brokerage Company.

Q. When you speak of a "general journal" you speak of a journal which you kept as the manager of the plaintiff?

A. As the treasurer.

Q. As the treasurer or whatever capacity you had and then that is the list which you sent, is it not?

A. It just seems to me there were four pages when I sent it but maybe it was only three.

Mr. Eriksson: Well, then we offer Exhibit F——

Mr. Murphy: Let me see it—no objection.

The Court: It may be received.

* * * * * * *

Mr. Eriksson:

[fols. 112-113] A. I can't answer that with a yes or no; I'll have to explain it——

Q. Just a minute—you don't recall them as clients?

A. I know both companies well.

Q. You know both companies well?

A. Yes.

Q. Well, did either of them do business with the Union Brokerage Company or through the Union Brokerage Company while you were its manager?

A. Not as shippers, not as importers and—or not as exporters—there might have been an error in the duty and we had to write them a letter about it—they became brokers in Seattle or places in the United States—they both have offices in Seattle and aren't listed as clients for lumber because the lumber clients are the mills, not the wholesalers or brokers; as a general rule these companies ship in their own name from the other mills; for instance, Gray Lumber & Shingle Company ships from a mill at Port Moody—I was just trying to think of the name of it but I can't—they take the entire output of that mill and we dealt with the mill but not with Gray Lumber and Shingle Company.

* * * * * * *

[fol. 114] Q. Well, we'll eliminate these two; the rest of them that you have named on this list, Exhibit F, were and had been shippers for whom the Union Brokerage Company had acted as licensed customhouse brokers, isn't that right?

A. They had been customers of Union Brokerage Company.

Q. And the two that we have singled out as not appearing on Exhibit F, in those two cases their principals had been served by the Union Brokerage Company?

A. I presume that's right.

* * * * * * *

[fol. 115] Q. In that connection, Mr. Jensen, it is true—so we understand the set-up—that these names were taken

from the ledger of the Union Brokerage Company, is that right?

A. Well, maybe from the ledger; I thought it was from the journal.

Q. Whether you call it journal or ledger—you took it from a book representing a permanent record of the Union Brokerage Company, isn't that right?

A. That's right.

. . . . . .

[fol. 116] Q. And under this system that has been prescribed by law, in the case of a shipment of merchandise into the United States on which duty is required, the broker—I am speaking of you now serving as the Union Brokerage Company—either advanced that duty and charged it to the shipper or consignee or charged it against the railroad that carried the merchandise or received the money in advance from the shipper—isn't that right?

[fol. 117] A. That's right.

Q. And because of those three situations and the law governing that kind of a business, it was your duty while managing the Union Brokerage Company to keep track of each entry?

A. Keeping track of each entry was part of the Secretary's job.

Q. But he was working under your direction as manager, isn't that right?

A. Well, it's a cinch I had to direct him.

Q. Well, of course, that may be—I'll pass that by for the present. That situation that I have just indicated by my previous question is the situation that produced the accounts from which that list, Exhibit F, was taken, isn't that right?

A. Most of these accounts were obtained either through the handling of fees or of refunds and not so much on the duty.

Q. Well, it was one or the other, isn't that right?

A. That would be right.

Q. And the reason for that is that whether you advanced the duty or it was to be collected at the destination of the shipment or advanced by the exporter, it might be an overpayment, isn't that right?

A. It might be.

Q. And in the case of an over-payment the exporter or importer, as the case may be, would have to have the [fol. 118] means by which to claim an over-payment or a refund, isn't that right?

A. We can call that correct.

Q. And in such a case the man to whom—or the agent to whom they turned was the broker who had served in making that particular entry, isn't that right?

A. If we didn't make the refund before they found out about it—if we didn't do it that way——

Q. In either case you would be the one through whom the refund would be paid?

A. That's right.

Q. And so in order to keep track of these things and be able to account for every refund—or the other way around, less duty than was actually required—you have to keep these accounts?

A. Well——

Q. Let me pause a moment—to make it a little simpler—there are cases where duty is unpaid too, isn't there?

A. Yes.

Q. And so you have to keep the account to be able to not only make claim for over-payment but also to make claims for under-payment against the shipper, isn't that right?

A. We don't do it that way.

Q. What did you do in regard to under-payments?

A. Whenever there was an underpayment, we get a notice [fol. 119] that the government had so much money coming and we go up and get the original copy of the entry and find out the shipper from the invoice on that and write him from that.

Q. Well, in any case, you had to keep track of the particular transaction, isn't that right?

A. We keep a copy of the entry.

. . . . . .

Q. Didn't you begin an account showing the amount of duty paid or remitted to be collected by the carrier and your fees?

A. We made a statement to the railroad company to that effect.

. . . . . .

Q. Now, Mr. Jensen, speaking of one part of these ac-
[fol. 120] counts and that part relating to refunds, there is a record made of every refund that is made, isn't that true?

A. Do you mean in the Union Brokerage Company or in the broker's office?

Q. Well, you did what the law required I suppose, didn't you?

A. Yes.

Q. And the law requires you to keep track of the refunds, isn't that right?

A. Oh, yes.

Q. And you did?

A. Oh, yes.

Q. In order that we may understand the situation, refund, in the first instance, is the amount or represents the amount of over-payment of the duty exacted from the importer or exporter, as the case may be, in any given instance of payment of duty, isn't that right?

A. That's right.

Q. And the word "refund" may not only include the difference between the proper amount of duty to be paid on a given shipment but also the liquidated damages suffered by the importer or exporter, as the case may be, for failure on the part of either the collector of customs or the broker to do something that the law requires, isn't that right?

A. I don't quite understand you there.

(Question Line 16 to 21 above read to witness.)

* * * * * * *

[fol. 121] Q. You may.

A. A refund is the re-payment by the government to the broker of excessive duties collected by the broker and paid to the government.

Q. Now, the next part of my former question is this: in addition to refund—in addition the refund may include, at times, liquidated damages, may it not?

A. You mean liquidated damages refunded by the government?

Q. Yes.

A. It may.

Q. Now, in order to be sure that the broker, customhouse broker, shall not lose his license, but assist the government

in serving its importers and protecting the revenue of the United States, it is necessary, is it not, in practice, to keep at all times an accurate account between the broker, on the one hand, and the shipper served, on the other?

[fol. 122] A. Yes, we keep accurate accounts.

Q. And it is—and the list, Exhibit F, is a sum total of the business done with shippers by the Union Brokerage Company so far as the number of clients are concerned at the time you made the list, isn't that right?

A. To the best of my knowledge that list includes all the shippers, all the clients.

Q. And in that same connection, speaking still of refunds, it is true, is it not, that these refunds may come up weeks, months and years after the duty has been paid?

A. Yes.

Q. Similarly, it is true, is it not, that underpayment of duty may be claimed against an exporter or importer, through the broker, weeks, months and years after the duty has been paid?

A. It may.

Q. And so, all these things that I have mentioned now combine to make it necessary to keep these accounts, isn't that right?

A. Those last two aren't so necessary for the accounts.

Mr. Eriksson: I see. I think this (indicating) is a pile consisting of 70 pieces of papers in writing or printing and I will ask to have it all identified as one exhibit, with the understanding, if we may, that when time permits, we will make an accurate count of the pieces of paper and arrange them according to dates.

The Court: You may offer them in that way if there is no objection——

[fol. 123] Mr. Eriksson: I'll ask to have them identified with that reservation that we arrange them according to dates and actually count the pieces of paper afterwards, if that is al- right?

Mr. Palda: Sure, that's al- right.

(Plaintiff's Exhibit G marked for identification.)

Mr. Eriksson:

Q. Mr. Jensen, will you kindly examine this bundle of documents of various dates but all assembled as Plaintiff's

Exhibit G and, after having examined them, state if it is true or not that all of them represent records of refunds—and, may I add to the question, that if you find any that do not represent a refund item that you take that out so that that particular document may be discarded as a part of that exhibit.

(Plaintiff's Exhibit H marked for identification.)

A. These (indicating Exhibit G) all appear to be notices of refund that come along with refund checks and work sheets attached to some of them.

Mr. Eriksson: Subject to the reservation first mentioned, namely, that after we recess we arrange them according to date and count them accurately, we offer Exhibit G as a part of the cross examination.

Mr. Murphy: You say these are statements of refund accounts and remittances together with work sheets con- [fols. 124-136] nected with them in some instances but not all the refunds but some of them——

Mr. Eriksson: Well, all that we have offered are——

Mr. Murphy: Well, I don't want to object to any exhibits; I'm trying to get in my head what the materiality of it is but possibly it will be developed later——

Mr. Eriksson: I'm sure it will be——

Mr. Murphy: I have no objection to the exhibit as such.

* * * * * * *

[fol. 137] Q. Well, my question was, at the time that you left or resigned there were pending claims or protests in the Customs Court of the United States handled by New York attorneys, isn't that right, and those claims were live claims?

A. That's right.

Q. They were claims that had arisen or that existed because of business done under your administration, isn't that right?

A. That's right.

Q. And those protests and those claims had not been determined?

A. That's right.

* * * * * * *

[fols. 138-147] A. I don't know.

Q. You don't know—on that point, for the present, it is enough. I'll revert to it later. Now, Mr. Jensen, when you

had gotten into the company and assumed its management you found that the business of the Union Brokerage Company had been and was a prosperous and profitable business, didn't you?

A. It wasn't a bad business.

* * * * * * *

[fol. 148] Q. That is all you had when you came to Portal?

A. Yes.

Q. Now, you found out from your own individual practice as a customhouse broker and from your services and office in the plaintiff's business that the prosperity of a customhouse broker's business depended on, in the first instance on the carrier—rail carrier—shipping merchandise into the United States through the port of entry where you were located, isn't that right?

A. That's right.

Q. In your case, at Portal, there was only one road coming in?

A. One railroad.

Q. And in addition to that there was some highway importations, isn't that right?

A. Yes.

Q. But the highway importations, which were subject to clearance, were comparatively small when compared with the shipments coming over the common carrier—the Soo or the C. P. R.?

A. That's right.

[fol. 149] Q. Probably representing only about ten per cent or less, is that right?

A. I couldn't say—oh, I'd say less than ten per cent.

Q. Five per cent?

A. Well, probably.

Q. And so long as the C. P. R., connecting with the Soo, carried shipments of merchandise into the United States, the business of the customhouse broker there had a chance to be successful, isn't that right?

A. That's right.

Q. And especially so after the two of you merged into the plaintiff corporation, isn't that right?

A. Yes, we were quite successful.

Q. Of course, where there is more than one road at a port of entry, there may be more competition, isn't that right?

A. Oh, there may be.

Q. Now, the shipments of merchandise into the United States virtually stopped through Portal on July 1, 1940, isn't that right?

A. Somewhere in July, 1940.

Q. Now, in that connection—it might to some extent be repetition but pardon me—the license that you had as an individual customhouse broker became used as a part of the bargain by the plaintiff to satisfy the requirements of the law that two of the officers, at least, should be individually licensed, isn't that right?

[fol. 150] A. I became one of the two licensed officers.

Q. And your license, your individual license as a customhouse broker was the same kind of a license which the plaintiff had?

A. Oh, yes.

Q. And both licenses or any license issued for that district covered the same territory, isn't that right?

A. That's right.

Q. Yours covering District 34 and the plaintiff's covered District 34?

A. Yes.

Q. Now, Mr. Jensen, when this change occurred in routing of shipments of merchandise, the good will of the corporation customhouse broker became completely wiped out unless the corporation was able to follow the changed flow of commerce, isn't that right?

A. I presume you can put it that way.

Q. And the customhouse broker, whether it was you or the plaintiff company, could, without getting any additional license, move to or with the flow of commerce if the new routing continued to come into the United States through the District for which the license was granted, isn't that right?

A. Oh, yes.

Q. And Noyes is in that district?

A. Noyes is in District 34.

Q. You understood that all the time?

A. I always knew Noyes was in District 34.

[fol. 151] Q. And when this change in routing of shipments of merchandise into the United States from Canada or through Canada took place, that change affected about

ninety per cent or ninety-five per cent of the merchandise shipments that had come into Portal?

A. It affected a large percentage—maybe 90 or 95 per cent.

Q. That change affected the importations and exportations of merchandise into the United States carried on and done by the men and importers listed on Exhibit F, isn't that right?

A. It affected the importations into the United States from Canada.

Q. It affected these people on Exhibit F, isn't that right?

A. Most of them; some of them are United States firms.

Q. Now, isn't it true, Mr. Jensen, that any importations or exportations made by these men or firms on Exhibit F were affected by this re-routing?

A. Any importations from Canada were affected but not the exportations from the United States into Canada.

Q. Then whenever any of these firms that had been the business clientele of the plaintiff, as you have testified, required the exportation by them into the United States of merchandise, that exportation or importation by them was [fol. 152] affected by this re-routing of shipments of merchandise into the United States, isn't that right?

A. The importations into the United States from Canada would be affected.

Q. And that applies to everyone listed in Exhibit F, isn't that right?

A. If they shipped from Canada.

Q. Yes, and why did you say now, Mr. Jensen, that if shipments were made by them in the nature of exports from the United States into Canada that the result was different from what you testified yesterday?

A. I don't remember what I testified yesterday but the result is this, if they shipped from the United States into Canada they can still ship via Portal but if they shipped from Canada into the United States they don't get so much opportunity to ship via Portal—

Q. Now, accepting that for the present, that is an infinitesimal percentage of the business done by shippers and firms shown by Exhibit F?

A. As far as the brokers are concerned, it is, yes.

Q. And so, the great percentage of business done by brokers at Portal was transferred by this act of re-routing mer-

chandise shipments into the United States through Noyes, isn't that right?

A. Through Noyes or other points east.

. . . . . .

[fol. 153] Q. I am talking about District 34——

A. But they could ship the shipments through Niagara and not come through District 34 at all; they did in some cases.

Q. We'll make it specific—the 95 percent or more of shipments that used to go through Portal, whether shipped by these people or other people, became, by reason of this change in routing, shipped into the United States through Noyes, isn't that right?

A. The great majority of them came through Noyes.

Q. And so you agree that when this rerouting of shipments of merchandise or routing of shipments virtually ceased at Portal and was transferred to Noyes, Minnesota, that the corporation license permitted it to do business at Noyes or serve its clients there at Noyes the same as it had or could have been done at Portal, isn't that right?

A. The corporation license was valid in Noyes.

[fols. 154-156] Q. Then please answer my question?

(Question, line 5 to 10 above read to witness.)

A. That's right.

. . . . . .

[fols. 157-166] Q. And as a matter of fact you did set up an office in Noyes?

A. I did set up an office in Noyes.

Q. And at the time you set it up you were the manager, the actual manager and the president and treasurer and director of the plaintiff corporation, isn't that right?

A. I was.

Q. And in setting up that office at Noyes you used the same license which as an officer and manager you used to fill the requirements on the plaintiff by the laws governing licensed customhouse brokers?

A. Yes, I used my individual license.

Q. And that individual license had been committed to the business of the plaintiff by reason of the arrangement and bargain made on September 6, 1938?

A. That license was to be used as one of the two licenses to enable the Union Brokerage Company to maintain its license to Portal.

Q. Or anywhere else in the district?—in district 34 of which Noyes is a part?

A. Yes.

* * * * * * *

[fols. 167-168] Mr. Eriksson: We offer Exhibit N in evidence.

Mr. Murphy: No objection.

The Court: It may be received.

* * * * * * *

[fol. 169] Q. Then what did you mean by saying to Mr. Clark, (reading "—and his assistant informs me that they will see that the C.P.R. Agent at Emerson will detach the bills of lading and invoices from the waybills on the merchandise sent to me to be cleared"?

A. Just that the agent of the C.P.R. would give to me or to Mr. Rime the bills of lading and the invoices on merchandise consigned to us to be cleared so that we could make the entry; in other words, we would get the bill of lading and the invoice from the Canadian railroad company.

Q. At Emerson?

[fol. 170] A. At Emerson.

Q. Now, in practice that would be an entirely irregular way to handle that business, wouldn't it?

A. I don't think so.

Q. The usual and the regular and the legal way for handling merchandise shipped into the United States is this, is it not, the shipper in Canada attaches to the car an instrument called the "waybill", and in addition attaches bills of lading which designate the broker in the United States who they entrust with the handling of that shipment, isn't that right?

A. They do that——

Q. And that bill of lading consigns the shipment to the custom broker at the port of entry?

A. That's right.

Q. And when the car comes to the port of entry, after having been released at the port of exit, those bills of lading are detached by the railroad agent at the port of

entry and separated into piles showing in one pile the bills of lading consigning the shipments for brokerage purposes to Mackay, or to any other agent at the port of entry, isn't that right?

A. That's the way they do it at Noyes now.

Q. That's the way they do it unless they invent some irregular method, isn't that right?

A. I don't know.

Q. You, in pursuance of this arrangement to get the business of the Union Brokerage Company shipped by these [fol. 171] shippers on Exhibit F, went over to Canada and made a deal with Mr. Spear, handed him a stamp, and arranged with him to change the bills of lading on every shipment addressed to the Union Brokerage Company and substituted your name for its, isn't that right?

A. That's wrong.

Q. You mean to say you didn't do that?

A. I didn't make any deal with Mr. Spear to alter any bills of lading.

Q. If not with Mr. Spear with some other agent, Mr. Murphy?

A. I never made any deals to alter any bills of lading.

Q. Did you testify at the time we took the deposition that you had left a stamp with Mr. Murphy and that you had made arrangements with him that by the consent of the shippers of bills of lading should be changed?

A. I did that by the consent of the shippers.

Q. But you never did it with Mr. Murphy, did you?

A. I never talked to Mr. Murphy or Mr. Spear until after I had come back from the west coast.

Q. And that is what you had reference to when you say in this letter: (reading) "I talked to Mr. Plow this afternoon and his assistant informs me that they will see that the C.P.R. agent at Emerson will detach the bills of lading and invoices from the waybills on the merchandise sent [fols. 172-187] to me to be cleared."?

A. I mean by that Mr. Plow had informed me that we would continue the practice as we did at Portal that the C.P.R. agent would detach the bill of lading and the invoice and give it to the broker, or to me in this particular case, at Emerson.

[fols. 188-223] Q. And, in any event, before you left his office you wrote these words: (reading) "Kindly deliver to Mr. Curtis Rime all bills of lading and invoices for ship-

ments to be cleared through customs by Norman G. Jensen or Union Brokerage Company"?

A. That's right.

. . . . . .

[fol. 224] Q. Well, so we understand the subject and make it as brief as possible, one of those daily clearance sheets shows the shipments that have been cleared by you or by the customhouse broker and it shows the fees charged and collected or the fee charged and sent to the carrier to be collected or carried on the books of the company as credit extended, isn't that right?

A. The clearance sheet shows the car number, the amount of duty advanced against the car, if any, and the amount of fee advanced against the car, if any.

Q. And what has been received, as indicated, or what has been paid and settled for either by cash collected on the day covered or by credit extended on account of the company is shown by O. K.?

A. That's right.

. . . . . .

[fol. 225] Q. Well, it's a key, is it not, because by using that clearance sheet, daily clearance sheet, showing the cars cleared O. K. as to accounts that have been charged or already paid, the amount of fees left to be collected and remitted by the carrier, if they are lost or if the books and ledgers and journals are lost then the customhouse broker can use that sheet and use those figures it contains and go to the Collector of Customs or the carrier and find out what was for a given day, isn't that right?

A. Yes, I think he could check back from that both with the Collector and the carrier.

Q. Of course, if the books such as ledgers and journals are available that makes it very much more expeditious, doesn't it, to find out what customers owe money, what customer has paid the fees, and how much the railroad owes, isn't that right?

A. Yes, I think we could say that's right.

Q. So the advantage of having a journal and the ledger consists in that the broker has from his daily work an assembled sum total of the day's work in the ledger and the journal?

A. Yes. There in the Union Brokerage Company we used another step between the clearance sheet and the ledger and journal which we call a day book.

[fol. 226] Q. Then, if you had all three you'd have an easy way to find how much money had been taken in, how much money was coming and how much money the railroad owed, isn't that right?

A. That's right.

Q. And if they are gone then you can use these daily sheets and by a lengthy laborious process reestablish the charges that would appear in assembled form in the books, isn't that right?

A. Well, I guess you could work it out but it would be lengthy and laborious.

* * * * * * *

[fol. 227] Q. Mr Jensen—I am just going to use one of these daily clearance sheets taken out of the file identified as Plaintiff's Exhibit Z and will then restore it. I have wihtdrawn one sheet from Exhibit Z and that sheet bears date of September 21, 1940, and I have withdrawn from Exhibit Y another sheet, with papers attached, dated October 4, 1939. This first sheet, namely the one dated September 21, 1940, contains two—is it two—clearances made on that date?

A. It contains two—the entry for two carloads of White Spruce lumber.

Q. And the sheet, with the work sheet attached, dated [fol. 228] October 4, 1939, taken from Exhibit Y, is another so-called clearance sheet that contains a considerable number of shipments cleared, isn't that right?

A. That's right.

* * * * * * *

Q. And speaking of the sheet dated September 21, 1940, taken from Exhibit Z, is there any indication of the amount of fees collected there?

A. No.

Q. But the sheet dated October 4, 1939, contains a number of fee advances, isn't that right?

A. Yes.

Q. I mean entries—and where the fee charged through the customer or client is paid or charged for collection—

where the fee is charged against the carrier to be collected by the carrier or paid by the carrier, there the fee is indicated, is it not?

A. That's right.

Q. But where the fee is not to be collected by the carrier the mark "OK" is made?

A. That's right.

[fol. 229] Q. And that "OK" means either that the amount of the fee has been received by you or charged on the books of the company against the shipper served?

A. That's right.

Q. And speaking of the one dated September 21, 1940, no fee having been indicated at all, it means either that whatever fee you earned for clearing these two shipments was either or had either been paid in cash on the day the clearances were made or put down in the books as credit extended, isn't that right?

A. This isn't complete——

Q. Wait a minute, identify it please, by date, so that we don't get mixed up——

A. The one that you have here, September 21, 1940, is not complete as is this record on October 4, 1939. If I were to remove this back sheet from the one on October 4, 1939, that would then show no more fees than this one does; there's a clearance sheet that corresponds with this copy of the entry.

Q. Well, you may examine Exhibit Z and help us reconstruct the complete record attempted to be shown by the one dated September 21, 1940, and will you attach whatever you have now withdrawn from the file to the sheet I had withdrawn.

A. I have attached hereto (indicating) the invoices covering the two cars of lumber shown on the entry dated September 21, and I have attached thereto also the clearance [fol. 230] sheet for September 21.

Q. So that now as you have reconstructed it, as a help to me and to the Court, it is now complete for that date?

A. It's complete for that date.

Q. And there (indicating) we find the marks "OK" for each one of those shipments?

A. Yes.

Q. And that, of course, is an indication that the fee charged for the service in clearing these two shipments

was either paid in cash or entered on the books of the company?

A. In this particular case it was entered on the books of the company.

Q. And that kind of a daily practice was pursued from the time you began to act as manager until you quit?

A. You mean to keep this copy of the clearance sheet?

Q. Yes.

A. No, I don't believe we started that as soon as I came into the company but shortly thereafter.

Q. Well, of course, I'm not so particular about the form of the sheets; I'm more particularly interested about finding out whether or not this method of indicating money to be collected for the broker by the carrier or indicating money that had been either collected in cash or settled by an account, had been maintained?

[fols. 231-232] A. Oh, yes.

Q. So that throughout your service as manager that feature of the business was the same?

A. Yes, it wasn't quite as complete as you have it there because the original of that clearance sheet is turned into the carrier and at the beginning of the time I came in there they didn't keep the original and before I conceived the idea of keeping a copy of the original Mr. Kramer just didn't do it. Mr. Kramer, by the way, generally made those clearance sheets.

Q. But they were made under your direction?

A. No, that was his job.

Q. But he was working under your direction?

A. You may put it that way if you wish; he was Secretary of the company, one of the managing officers.

Q. The same kind of business was conducted down to the last day that you were there, isn't that right?

A. That's right.

. . . . . .

[fol. 233] Q. In the case of refunds, which we talked about this morning or yesterday, to illustrate in part at least what I am trying in my humble way to present, I'll call your attention to the refund item dated December 6, 1939, and ask you if it isn't true that that settlement was made on that date for refunds accruing on a shipment made in 1932 or cleared in 1932?

A. That's right.

Q. Now, protests we have already talked about to some [fols. 234-235] extent, and they are made in the Customs Court by attorneys who specialize in that business, isn't that right?

A. Yes, or the broker may handle it in Court himself if he so desires.

. . . . . .

[fols. 236-256] Q. Now, it's true, is it not, that on November 5, 1940, every dollar had been taken out of all the accounts of the Union Brokerage Company, isn't that right?

A. I think that's right.

Q. And the man who had taken it out is yourself?

A. Yes, I wrote all the checks.

. . . . . .

[fol. 257] Q. Did I understand you correctly to testify yesterday that bonds were given to secure the proper performance of duty by the Union Brokerage Company as a licensed customhouse broker?

A. The Union Brokerage Company had to file, with the Collector of Customs, Term Consumption and Immediate Delivery entry bonds, if that answers your question.

Q. Yes, and did that relieve you as an individual licensed customhouse broker of furnishing a bond?

A. Yes, it did.

Q. So you were using—you were possessed of an individual license and used it because of the bonds that the Union Brokerage Company had delivered, is that right?

A. I don't understand that question.

Q. Well, because you were an officer of the company and had an individual license as a customhouse broker, you operated as the officer of the licensed customhouse broker.

A. (No answer.)

Q. I don't know if I make it clear. You have just made it clear to us, if I understand you correctly, that although you were an individually licensed customhouse broker, you, yourself, did not have to furnish a bond to the government because you were the officer of the licensed corporation customhouse broker?

A. No. It wasn't because I am an officer of a licensed [fol. 258] corporation broker but because the entries were

made in the name of the corporation and not in the name of any individual. The bond has to be filed to the government protecting the government from the acts of importers of record whose name was on the entry; when the Union Brokerage Company made entries they made them not in the name of any particular officer; therefore, whether an officer was licensed or not, he could make entries in the name of the Union Brokerage Company on the Union Brokerage Company bond.

. . . . . .

[fol. 259] Q. What became of that bond on November 5, 1940?

A. I didn't look for it on November 5, 1940. I suppose it was still in the safe. When the bond was renewed I filed it in the safe and that's the last I can remember of it.

(Plaintiff's Exhibit DD marked for identification.)

Mr. Eriksson: I have here certified copies of the bonds of the plaintiff and offer them in evidence.

Mr. Murphy: No objection. I can't see the materiality but——

The Court: It may be received.

. . . . . .

[fol. 260] Q. And where are these bonds filed?

A. With the Collector of Customs at the port of entry at which the broker is working or at which the entry is to be made.

Q. Where the entry is to be made?

A. Yes.

. . . . . .

[fols. 261-262] Q. And what use did you make of those individual bonds that you just talked about?

A. Used them for the purpose of making entry.

Q. For yourself?

A. For myself and as a customhouse broker. You see, I had occasional seed importations for myself through Portal. They required that we have single entry bonds for seed. That was the regulation at one time. We couldn't use the term bond on seed so we had to make single entry bonds and then I'd write out the bond in my own name and make the

entry in my own name at Northgate where I conducted a customhouse brokerage business.

. . . . . .

[fol. 263] Q. Then, did you say yesterday, or did I understand you correctly, that you have not made use and secured the consignment of shipments made by exporters or importers to the Union Brokerage Company as broker-consignee?

. . . . . .

A. I have to answer by more than yes or no. Whenever we have received those bills of lading consigned to the Union Brokerage Company my instructions to Mr. Rime were to take them back to the Canadian car... and ask to have them ascertain which of the brokers working at Noyes was to clear them and to get them for us if possible.

Q. Passing up the significance of that answer, which I'll [fols. 264-267] call attention to later, the fact is that you have cleared, at Noyes shipments consigned to the Union Brokerage Company, isn't that right?

A. I have heard that we have; I don't know.

Q. You have heard it?

A. Yes. I haven't made any entries on bills of lading consigned to the Union Brokerage Company.

(Plaintiff's Exhibits EE and FF marked for identification.)

Q. Your answer makes it necessary at this point to stop and talk a little bit about Mr. Rime. Mr. Rime is your authorized agent or employee?

A. Yes.

Q. And he clears shipments of merchandise from Canada into the United States through the Port of Noyes?

A. Yes, he makes entries in my name for me.

Q. And he does that under a power of attorney granted by you?

A. That's right.

Q. And that power of attorney was granted before July 1, 1940?

A. Yes.

. . . . . .

[fols. 268-271] Q. And since he got this power of attorney filled out and granted to him in the form required by law he has been your agent at Noyes?

A. He has been my agent at Noyes.

Q. And acting with the same powers as you could have acted with yourself?

A. That's right.

Q. So that you have, during all of this time, acted through him?

A. That's right.

* * * * * * *

[fol. 272] Q. Well, so I understand the term "Consumption Entry," it is one designation of certain kinds of entries and then there's some others but in usual parlance the paper is referred to as "Custom Entry," isn't that right?

A. Or just plain "entry."

Q. Now, in each of these cases, or in any other case, there is a bill of lading attached, is there not?

[fol. 273] A. Yes.

Q. And that bill of lading is filed with the Collector of Customs?

A. It is filed with the Collector of Customs with the original copy and two carbons of the entry.

Q. And you haven't kept the bills of lading that went with each of these cars, have you?

A. We have to file those with the entry with the Collector of Customs.

Q. Now, you know that you did enter these cars, didn't you?

A. We did enter those two cars.

* * * * * * *

Q. And it is true, is it not, based upon your own familiarity and knowledge of the laws and rules and regulations, [fol. 274] that without filing such a bond no person, whether licensed as a customhouse broker or not, has any right to handle or monkey with any shipments of merchandise consigned to another; isn't that right?

* * * * * * *

Q. Well, I'm not going to argue the point. I'll make it simpler if I can. We will assume that you operate and do business in Noyes, Minnesota. You understand that?

A. Oh yes.

Q. And we will assume that you operate the business of a duly licensed customhouse broker at Noyes, Minnesota.

A. Yes.

Q. In order for you to handle any shipments of merchandise coming into the United States through the port of Noyes you will have to file a bond, isn't that right?

A. It is generally accepted that we have to file a bond.

Q. Well, that is the rule and the regulation, isn't it?

[fol. 275] A. The Collector may waive it if he wants to but he hasn't waived it.

Q. You say the Collector may waive it.. In such a case an agent having a power of attorney from you could likewise, depending and relying and resting on your own bond, could handle merchandise?

A. Yes.

Q. But in neither case do the laws or regulations permit you under those conditions to take charge of bills of lading consigned to some other broker, isn't that right?

A. That's the way I understand it.

Q. Now, in this case at Noyes, Minnesota, you testified a little while ago, did you not, that the bills of lading were taken from the agent at Noyes and you brought them back to Emerson to be changed, isn't that right?

A. We brought them back to Emerson to have the agent at Emerson ascertain the broker when the broker mentioned on there was not operating at Noyes.

Q. And you claim that it is your intention to present to this Court now that the agent at Emerson would have any such authority to decide which one of you two or three or four at Noyes should handle a shipment?

A. He can ascertain from the shipper who was to handle it.

Q. And taking it away from the one to whom it was consigned?

[fol. 276] A. If the shippers instructions are to change it he may change it as the shipper instructs.

Q. And still you contend that without a bond having been first filed in a case of that kind to cover cases of that kind that you or your agent would have the right to do so?

A. I don't know what you are referring to as "the right to do so" in this case.

Q. Well, would you have a right to take the bills of lading consigned, to make it specific, to the Union Brokerage Com-

pany and go over to Emerson and say, "Fix these up in any way that suits you and then give them back to me". Did you have a right to do anything like that?

A. I think the proper place to take the bills of lading if they are not properly filled out or marked is back to the incoming carrier.

Q. That's your answer?

A. That's my answer.

. . . . . .

[fol. 277] Q. Then there is a bill of lading in duplicate, isn't there?

A. There is a customs bill of lading. It may be in duplicate or it may be only one copy.

Q. And one is for the—or something of that nature—is for the officers or the officials at Emerson, isn't it, the port of exit?

A. I don't remember of them getting a copy of the bill of lading. They might.

Q. What do they take off to show that this car is ready to go on into Minnesota?

A. I call it an export entry.

Q. That is detached?

A. Yes.

Q. But when they have detached that then the bill of lading still sticks to the car or is attached to the car showing the destination and the person to whom it is shipped in Minnesota, isn't that right?

A. The bill of lading may show that.

Q. And in addition to that what is attached to it?

A. There may be an invoice.

Q. There is usually, is there not?

[fol. 278] A. Oh, I wouldn't say usually; about half and half I believe.

Q. But in any event if there is no invoice the broker makes an invoice?

A. The shipper has sent the invoice by mail to the broker most generally.

Q. And that is in duplicate or triplicate?

A. Generally in duplicate.

Q. And then when the car comes into the station at the port of entry the station agent detaches the bill of lading?

A. He does at the present time.

. . . . . .

Q. Well now, talking about the usual practice at Noyes, the bills of lading are attached to this car when it came in [fol. 279] and an invoice was either attached or sent to the broker?

A. Well, we can say that is true.

* * * * * * *

Q. Now then, when the car, this car, came to Noyes, Minnesota, on the date shown by the exhibit, the bill of lading was detached from that car by the station agent, isn't that right?

A. I think it was at that time.

Q. And the invoice was either detached or already received by the broker, isn't that right?

A. If the invoice was with the bill of lading it was detached by the agent of the C. P. R. and given with the bill of lading to the broker.

Q. And if that consignment is to the Union Brokerage Company then it follows that whoever took charge of that shipment or assumed control over it would have to take that bill of lading and go somewhere and get it changed?

A. It was so consigned——

Q. Is it right? Yes or no?

A. Not necessarily. If the Union Brokerage Company received it then it was consigned to them. They wouldn't have to take it back.

Q. You had no right to do it nor your agent without a [fol. 280] change, did you, so long as there was no bond filed?

A. We couldn't make the entry if it was consigned to the Union Brokerage Company.

* * * * * * *

Q. Now, just one step farther in this connection, the invoice is taken by you, or whoever acts as broker, to the Collector of Customs?

A. Along with other papers.

Q. And there the broker either stamps or writes something on the invoice which is left with the Collector of Customs to indicate that that particular shipment is sponsored or responsibility assumed for it by the broker producing the invoice, isn't that right?

A. Your question is hard to answer because it isn't clear

to me at all in relation to the procedure as I understand it in customs work.

. . . . . .

[fol. 281] Q. Well, just a minute. And there the one copy of the invoice is left for the Collector of Customs, isn't that right?

A. We say "Customs" and leave off the "Collector of Customs" and then we can say it's right.

Q. Alright, I'll follow your technical use of language. We leave it with the Customs and on that invoice you either stamp your name as the broker or leave some other evidence in writing, or otherwise, to show that you are the broker for that shipment, isn't that right?

A. That would be right.

Q. And when that is done then the Customs sends its inspector to inspect the shipment to see if the shipment actually conforms to the invoice, isn't that right?

A. That's right.

Q. And the moment the inspector has done that the shipment is cleared or the carrier is permitted to proceed with the car or shipment, isn't that right?

A. As far as the Customs is concerned.

Q. So far as the Customs is concerned that shipment is then cleared or may proceed isn't that right?

A. That's right.

Q. And then the broker does his work after that?

[fol. 282] A. That is the procedure at Noyes.

Q. And in that way the broker serves to expedite the flow of commerce, interstate or foreign commerce, isn't that right?

A. The broker allows or assists in the movement of the shipments. I wouldn't know whether it was interstate or foreign commerce. It makes no difference; the shipment moves, anyway.

Q. And without such service and without these steps that I have so imperfectly described it would impede or delay and increase the expense of handling these importations and exportations, isn't that right?

A. I presume it would. I never went into that.

Q. In other words, after you have gotten the records at the Customs office in such shape that the inspector has the right to go and inspect the shipment; your work in com-

pleting the entry may take minutes, it may take hours, isn't that right?

A. Oh yes, it takes time.

Q. It takes time and in the meantime this shipment may be on its way many, many miles by the time you get through?

A. Yes. We have 48 hours in which to make an entry.

* * * * * * * *

[fols. 283-284] A. Oh yes. You left out one step in clearing the shipment——

Q. Well, I wouldn't be a bit surprised if I left out two because I'm not a customhouse broker.

A. The one clearance sheet goes to the carrier in addition to the clearance sheet to the Customs before the shipment may move. I just wanted to have that in.

Q. Is that delivered by the Customs Inspector or by the broker?

A. By the broker. There is a copy of the clearance sheet delivered to the carrier and there is a copy of the clearance sheet delivered to the Customs.

Q. That is the same thing we discussed last night on which is shown the amount due the carrier—I mean the amount of duty that the carrier is to collect as well as the amount of fee he is to collect for the broker?

A. That's right.

* * * * * * * *

[fols. 285-301] Q. In other words, you had, by October 1, 1940, through your campaign on these various trips that you have referred to, gotten these people to turn the business over to you at Noyes who formerly did business with the Union Brokerage Company?

A. I received business from clients who formerly did business with the Union Brokerage Company.

* * * * * * * *

[fol. 302] NORMAN G. JENSEN, recalled for further cross examination under the statute.

* * * * * * * *

A. I can make this statement: there were some shipments that arrived at Noyes consigned to the Union Brokerage Company.

. . . . . .

[fols. 303-304] Q. Now then, the next question has already been answered practically but if you wish to add anything to it, do so. The practice employed was to take such bills of lading and invoices from the carrier at Noyes, bring them to the C. P. R. officials at Emerson and there get them changed over to you individually?

A. It is correct down to "and there", which should be: and there have them ascertain the proper broker.

Q. And this was done because you claim it to have been true, or to be true, that the C. P. R. had the right to redetermine for the shipper which of the brokers at Noyes should handle shipments consigned to plaintiff as broker since plaintiff had no office at Noyes?

A. The incoming carrier may ascertain the proper broker when the shipment comes with no broker designated or a broker designated which is not operating at that port.

Q. And that was your theory for doing that?

A. Yes.

. . . . . .

[fol. 305] Q. At that time you were drawing your regular salary as President of the plaintiff?

A. I was.

Q. And to effect this change in the consignments, that you have described, you had to represent, and you did represent, to the C. P. R. officials and the shippers consigning shipments to the plaintiff, that the plaintiff was not doing business at Noyes?

A. Read the question please.

(Question, Line- 6 to 10 above, read to witness.)

A. That's right. The plaintiff was not doing business at Noyes.

Q. And that despite the fact that you were in Noyes as its paid manager?

A. I wasn't in Noyes very much.

Q. Whenever you were there you were paid as its manager, were you not?

A. I received a monthly salary from the Union Brokerage Company.

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[fol. 306] Q. I call your attention to Exhibit MM and I ask you to state if that is not a carbon copy of a letter written by you after July 1, 1940, regarding the plaintiff's business?

A. Yes, I wrote the original of this letter.

Mr. Eriksson: We offer Plaintiff's Exhibit MM in evidence.

Mr. Murphy: No objection.

Mr. Eriksson:

Q. Now, this letter is taken from the file which you examined this forenoon, isn't it?

A. It is a copy of a letter addressed to E. A. Towns. I didn't notice whether it was in there this forenoon or not.

[fols. 307-309] Q. Didn't you read it then?

A. No.

Q. And in this letter you say to these people, (reading) "I notice that I have not received the check for $28.00 covering the June account. It may be that this was sent to Noyes. I will appreciate an early reply as I am closing the affairs of this company—under my supervision".

A. I meant just exactly what I say there: I am closing the affairs of this company under my supervision. My supervision would end within the next ten days after that letter was written.

• • • • • • •

[fols. 310-331] Q. At the end of September, 1940, you had set up a liability in your favor of $512.78, isn't that right?

A. That's right.

Q. And during that month you had received salary in the sum of $275.00?

A. No, $250.00; you want to remember that $25.00 of that goes to Applebaum.

Q. Well, probably; did you send $25.00 to Applebaum in September?

A. I'll see. No, it was carried on the books right there, (indicating) $24.75.

Q. All right, $24.75, and that is included in that salaries of $275.00?

A. That's right.

Q. So that you got $250.00. And then travel in September $168.12?

A. That's right.

. . . . . .

[fols. 332-337] Q. And then it is true here, as it was before when you testified in regard to the Portal business, that the bills of lading which these items represent are left with the Collector of Customs or at the Customs office?

A. Yes, in the Customs office.

Q. And the duplicate is sent on with the car when the car is released by the station agent or by the customs?

A. If there is a duplicate we retain that.

. . . . . .

[fol. 338] Q. Now then, will you please refer to your [fols. 339-351] ledger and journal and tell us how much fees were taken in for July, August, September, October and November, 1940, which, I suppose, or at least my question assumes, will be based on similar records.

A. The total amount of fees collected in July, 1940, $944.67—collected or charged that is——

Q. Collected or charged?

A. Yes. For August, $1377.75; for September, $756.80; October and November appear to have been combined in here, $2800——

Q. How much?

A. $2860.00——

Q. Now, give the rest for December to the present time.

A. December, $929.05; January, $895.00; February, $627.10; March, $587.50; April, $574.00; May, $968.50; June, $1043.50.

[fol. 352] Q. And the brief survey that has been made in this examination of the work together with the experiences that you know about makes the business of customhouse brokers a very technical business?

A. It's technical.

Q. A broker has to understand the laws and regulations in order to properly serve the importers and the government, isn't that right?

A. Yes, he has to know the things pertaining to the business.

Q. Now, you selected Mr. Rime with only five days' experience?

A. Five days' practice.

Q. And where were those five days' practice?

A. Over at Portal.

Q. Under your direction?

A. Under my direction.

Q. And neither Mrs. Anderson or Mrs. Kramer knew that his work was done at Portal for the purpose and for the intent to transfer his services for you individually at Noyes?

[fols. 353-381] A. He wasn't working for the Union Brokerage Company at Portal.

Q. What was the work he did at Portal that gave him the practice or experience?

A. Oh, I helped him make out some entries and showed him how to make some clearance sheets.

Q. And was that work done in connection with the plaintiff's business?

A. I don't remember whether it was done in connection with the business or as practice.

Q. Whether it was one or the other it was done with the secret intention on your part to make use of his services against the plaintiff at Noyes?

A. It was done with the intent of having him work for me at Noyes.

Q. Without any permission granted by the corporation?

A. That would be correct.

* * * * * * *

[fol. 382] Claude A. Phillips, called as a witness in behalf of the plaintiff, was duly sworn on oath and testified as follows:

Direct examination.

Mr. Eriksson:

Q. Will you give the reporter your full name?

A. Claude A. Phillips.

Q. And where do you live?

A. At Noyes, Minnesota.

Q. What is your business?

A. Railroad cashier at Noyes.

Q. And for which railway; are you cashier for both the Great Northern and the Soo at Noyes?

A. I am.

Q. They have a common depot at that point?

A. Yes, sir.

Q. In addition to that are you the deputy sheriff up there?

A. I am.

Q. How long have you been the cashier for the carriers at Noyes?

A. Since August 18, 1920.

Q. Will you please tell in your own language what the duties are of your position?

[fol. 383] A. I check all accounts, make railway settlements, pay customs duty and pay brokers clearance charges and handle various claims and——

Q. When goods come from across the border, subject to entry here in the United States, what is done by the railway or by you?

A. The papers are stripped, that is, the bill of lading and invoices and other papers——

Q. Well, right there I think we had better stop because I'm not so clear about that myself; what do you mean by papers?

A. The papers that the—that accompany the shipment to be delivered to the customs broker.

Q. And what are they?

A. Usually a bill of lading and stock contract, invoices and veterinarian certificates—various papers of that kind.

Q. And what about a waybill?

A. The waybill stays in the railway office.

Q. Are these papers attached to the car or in the possession of the conductor and if you have to qualify, please explain?

A. The papers are usualy attached to the waybill for the car. The waybill is the instructions to the railroad for the conductor handling the car.

Q. And when a car containing a shipment of merchandise into the United States from abroad—what is done with those papers?

[fol. 384] A. They are delivered to the customs broker to whom they are consigned.

Q. But first of all, before that is done, do you get them or does the railroad official in charge of the depot get them?

A. Yes.

Q. Does the conductor bring them into the depot?

A. The conductor brings them into the depot.

Q. And he does that without regard to whether the papers are assigned to one or the other broker, is that right?

A. Yes, sir.

Q. And when they do so come into the station what do you or those on duty do?

A. They usually sort the bills in piles for the various brokers and remove the papers.

Q. And when they have been so segregated or separated into piles for the respective brokers, then what happens?

A. They are usually pinned on—the pins are removed and they are piled up and delivered to the customs broker to whom they are consigned.

Q. Do these bills of lading and other papers attached to them ever show any—ever fail to show a broker consignee?

A. At times.

Q. Then in such cases, what is done?

A. The car is refused; that is, refused——

[fol. 385] that is, from the connecting line and we notify them of the fact.

Q. Notify who?

A. The connecting line; it can be the Canadian Pacific or Canadian National or the line that delivered it to the railroad line on this side of the boundary.

Q. That is, you or the party acting for the railroad notify the connecting line?

A. Yes, sir.

Q. In that event, is it true that the shipment is not either inspected or turned over to the customs or the broker or any broker until the connecting line furnishes new papers?

A. Yes.

Q. Are those instances rare or otherwise?

A. Oh, there are a few of them.

Q. So that, is it true or it is not true that each car that comes to your yard, that is, the yard of the Soo or the Great Northern, has, by either a waybill or invoice or bill of lading, the broker designated?

A. Yes, it has.

Q. Now, do you recall that in June or July, 1940, Mr. Jensen and Mr. Rime came to Noyes?

A. Yes.

Q. Prior to that time had there been a change in routing shipments into the United States from Canada?

A. I believe the date was July 1st that the routing was changed.

[fol. 386] Q. The change in routing became effective July 1, 1940?

A. Yes.

Q. Prior to that time what had been the routing?

A. Well, the Canadian Pacific decided they wished the long haul instead of delivering the west coast cars to the Soo Line at Portal; they hauled them through Winnipeg and down through Noyes.

Q. And that became effective on July 1st, you say?

A. Yes.

Q. In anticipation of that change, or in preparation for it, you as chief clerk there, can you give us any information as to whether or not the Soo had made any local improvements at Noyes or extensions of the yard service. If you don't recall, we won't stop to inquire about it.

A. I can't recall the dates that they made them.

Q. You can't recall the date?

A. I can't recall whether they were before or after.

Q. Well, were there improvements or changes in the yard there?

A. Yes, many of them.

Q. During that approximate period, is that right?

A. Yes.

[fol. 387] Q. And you don't remember the dates; from your experience as a chief clerk, together with other servants of the two roads, can you say whether or not the shippers sent invoices by mail to brokers?

A. Yes, they did.

Q. And in such cases what papers are conveyed to the broker at Noyes by mail?

A. Well—those I have seen are usually invoices.

Q. And what recognition is given to those invoices if mailed to the broker and presented by the broker at the station?

A. (No answer.)

Q. What I am trying to get at is if the broker presents invoices received by mail to you or to others working for the two roads, are they sufficient authority for you to deliver the bills of lading to that broker?

A. No, sir.

Q. What more has to be done?

A. The bill of lading has to be consigned to the broker.

Q. The bill of lading, in addition, has to be consigned to the broker. Well now, Mr. Phillips, it appears here that on June 29, 1940, Norman Jensen left some written directions—Plaintiff's Exhibit Q—did that come to your attention—did you see it, I mean?

A. Yes.

Q. And when you saw it you may state whether or not [fol. 388] you proceeded to follow the instructions?

A. I did.

Q. And you did so assuming that the Union Brokerage Company was in Noyes?

A. Yes.

Q. And beginning with July 1, 1940, can you state of your own knowledge whether or not shipments of various kinds came consigned by shippers to the Union Brokerage Company at Noyes?

A. I saw some of them.

Q. And to whom were those shipments so consigned delivered?

Mr. Murphy: Just a minute. May I ask a question?

Mr. Eriksson: Yes——

Mr. Murphy:

Q. You are speaking now, Mr. Phillips, with reference to certain shipments some time back in 1940 and what was done with them. Are there records that are maintained and kept by the railroad companies whom you serve which show the shipments and what was done with them?

A. There are no records that I know of.

Q. There aren't any records at all?

A. Not in possession of the railroad company.

Q. And you rely then entirely upon your memory?

[fol. 389] A. Yes, sir.

Mr. Murphy: Alright.

Mr. Eriksson:

Q. Well then—my question was——

(Question, line 21, page 280 read to witness.)

A. As far as I can—as I know, I can only remember delivering them to Mr. Rime.

Q. Mr. Rime?

A. Yes, sir.

Q. I'd like to make a brief reference, Mr. Phillips, to the requirements of law governing the papers evidencing the shipment of goods. As I understand it—you correct me if I am wrong— assume that a shipment starts out in Calgary, Canada, consigned to some one in Minneapolis, by way of Noyes—so far you understand me alright——

A. Yes.

Q. At the time that shipment starts out from Calgary consigned to, say, the — company at Minneapolis, what papers are attached to the car when it starts out?

A. The shipper would make out a bill of lading and several copies.

Q. How many copies?

A. Usually four in the case of the Canadian railroads and from the second copy the railroad company would make out a waybill; the second copy would then stay in the originating office——

Q. Wait a minute; I'd like to follow that; it is clear to you but not so clear to me. One copy the railroad com-[fol. 390] pany keeps in Calgary?

A. Yes.

Q. And the others?

A. The fourth copy would be attached to the waybill.

Q. And of the waybill is there more than one copy?

A. Except for railroad accounting purposes, no.

Q. Well, do they keep one for accounting purposes at the beginning point?

A. Yes, usually one, sometimes more.

Q. But there is one that is attached to the car?

A. Yes.

Q. And what does that waybill show?

A. Shows the car number, the date, waybill numbers, destination, originating station, the shipper, the route, the consignee, any hold over for icing or other care, then the commodity would be stated, the weight, freight weight or rate, I mean, amount to be collected and there is usually, in fact almost always, a list of all papers that accompany the shipment crossing the boundary.

Q. And does that paper you call the waybill indicate the name of the broker or does it not?

A. It usually does.

Q. It usually does indicate or state the name of the broker to whom that shipment is consigned for brokerage purposes?

[fol. 391] A. Yes.

Q. And does that waybill remain on the car until it is finally received by the ultimate consignee or consumer?

A. It stays on the car—travels with the conductor of the train but it does stay with the car until it reaches its destination.

Q. And that is the waybill, is it?

A. Yes, sir.

Q. Now, in addition to that you mentioned the bill of lading and what is the object and purpose of the bill of lading?

A. I believe the customs laws state that the holder of the bill of lading is the owner of the merchandise for the purpose of making entry.

Q. And the holder then is the designated customhouse broker?

A. Yes.

Q. Now, there is a provision in the—first I'll ask you if you are familiar with the Tariff Act of 1930 so that you know whether or not it provides for the issuance of the carrier's certificate in addition to any certificate issued at the point of origin of a shipment?

A. Yes, there is such a provision; I think it's 484 or something like that.

Q. Now, explain that provision as it is in practice, Mr. Phillips?

A. Where the original waybill was taken up by the customs broker and filed in the customhouse with the entry, [fol. 392] especially with ordinary bills of lading, it was found it was impossible to make deliveries of cars at the destination——

Q. And the word "destination" as used by you now, is that the residence or point of the broker or the ultimate consignee?

A. The ultimate consignee; and the provision was made so that the incoming carrier into the United States could make a carrier's certificate which states that the customs broker is the same as stated on the original bill of lading.

(Plaintiff's Exhibit DDD marked for identification.)

Q. I have here a series of papers, all connected and identified as Plaintiff's Exhibit DDD, and ask you whether or not the last sheet of this exhibit illustrates what you have just discussed, namely, the carriers certificate—the words at the bottom there?

A. It does.

Q. Is that the kind of certificate attached to such a shipment that we have been discussing coming from Canada being consigned to someone in Minnesota—is it granted at the point of beginning or point of origin?

A. It could be but——

Q. It could be. Now, if it is not that kind of a paper then what kind is it?

A. You have a copy of a bill of lading and were you speaking of this certificate alone?

[fol. 393] Q. Yes, this (indicating) certificate alone.

A. That could be but not usually.

Q. Now, to get this kind of a certificate which you have called a carrier's certificate what has to be done by a person at Noyes acting or seeking to act as a broker for a shipment consigned to somebody else for brokerage purposes?

A. That would have to be furnished by the originating railroad upon which the shipment originated.

Q. Well, assume in this case that a shipment comes consigned to Noyes, Minnesota, to the Union Brokerage Company and Mr. Jensen wants to take that and take it over to Emerson to get it changed so that he can act as broker for that shipment, what has to be done to do that?

A. The foreign railroad would have to furnish it and I don't believe it could be legally furnished without first taking it up with the originating station.

Q. Well, the first thing that has to be done, you correct me if I'm wrong, to get that evidence of brokeage consignment from someone at the depot in Noyes, is that right—you or somebody would have to give that bill of lading and invoice to Mr. Jensen or his man?

A. Yes.

Q. And before he could proceed to broker that particular shipment what would have to be done?

[fol. 394] A. He would have to furnish a carrier's certificate showing that it was consigned to him before the customs could allow him——

Q. Just a minute—where would that have to be issued?

A. The nearest place to Noyes would be Emerson.

Q. And to do that legally what has to be done?

A. They would usually telegraph the originating station and find out to whom it was consigned.

Q. Then in every such case where such a change is legally done there will be a telegraphic or telephonic record left of any such transfer?

A. There should be, yes.

Q. If it was done by telegraph or telephone?

A. There should be.

Q. And that would require, if it were done at Emerson, how much time, say, to get such authority from Calgary?

A. Oh, it usually takes about half a day.

Q. Now, do you know whether or not Mr. Jensen has taken shipments consigned to the Union Brokerage Company or his man, Mr. Rime, and returned with a carrier's certificate transferred over to himself or where would that be found; where can that be located?

A. Are you referring to any certain time?

Q. Well, say November 5, 1940; assume if we may for [fol. 395] the sake of the record that consignments—that shipments came consigned to the Union Brokerage Company and they were delivered to Mr. Rime or Mr. Jensen and there was a change in the certificate or——

A. I don't believe I had any knowledge that the certificates were being changed at that time.

Q. But where and how would such a change be discovered or be located?

A. The only place would be in the Canadian Railroad's records if there were any.

Q. Would there be any record at the customs office indicating a change?

A. Not unless you had the original papers.

Q. Without the original papers it couldn't be located, you think?

A. No.

Q. And the proper way to get a carrier's certificate to take the place of the original one sent out from the point of origin would be to get the shipper at the point of origin to authorize the railroad officials at Emerson to make the change?

A. Yes.

Q. And what has to be done to make a report of the desired change?

A. I don't just understand your question?

Q. Well; assuming that I am a broker at Noyes and I get hold of somebody else's shipment consigned to some [fol. 396] other broker and I take that broker's shipment or evidence of shipment for brokerage and go over to Emerson with that to get a carrier's certificate in its place, in the place of the one that comes with the original papers, what would I have to do to secure authority on the part of the railroad officials to make that change?

A. I don't believe any railroad official would have authority to——

Q. The railroad officials at Emerson have no authority to make such a change?

A. No, sir.

Q. Before they could make a change would they have to get a kind of authority from the original shipper?

A. The original bill of lading would have to be turned into one of the general freight office officials and a new bill of lading issued showing it.

Q. It appears, or it will appear, if it does not already do so, that Mr. Jensen left a stamp with his name on to be used in connection with some green ink to stamp on papers under certain circumstances and in certain cases; would such a stamp appear upon the papers presented in connection with the clearance of the shipment? I mean stamped impression on the papers.

A. It could appear on the bill of lading.

Q. And in such case state whether or not that would indicate a transfer or a change in the original papers?

[fol. 397] A. Well, the shipper could have a stamp and could have used it.

Q. I see—alright; now turn to another subject that concerns the accounting. As chief clerk for the two railroads operating at the station in Noyes, namely the Great Northern and the Soo, are you the man that has the custody and control of the funds of the two railroads paid out for duty and brokerage fees?

A. Yes.

Q. And in doing that what evidence do you have to have before you can pay out a dollar; in other words, what kind of an instrument or voucher does the broker present before they can get from you money for duty or fees?

A. I think that is optional as long as we get the list so we can check it and take care of the funds.

Q. The list is what I'm driving at; do they furnish a list?

A. Yes.

Q. Have you got the list in the case of Rime and Jensen?

A. I have them here.

Q. Are those (indicating) the originals?

A. I believe so. They were the lists used by the railroad company furnished by Mr. Rime——

Q. And the broker, whether it be Rime or somebody else, calling on you to pay them—pay duty or fees, they keep one, a duplicate?

[fol. 398] A. Well, I have no knowledge as to that.

Q. Are these (indicating)—I don't want to introduce them and encumber the record but what are these in this bunch so that Mr. Jensen and his counsel can follow us?

A. They are lists of shipments handled by Mr. Jensen with the amounts of duty and brokerage to bill on them.

Q. Well, you——

Mr. Eriksson: May I interrupt for a moment to ask Mr. Palda or Mr. Murphy to ask Mr. Jensen if you haven't got duplicates and if you will recognize them as a basis for the payments. They are the vouchers on which the payments are based, isn't that right?

Mr. Murphy: We will assume that is what they are.

Mr. Eriksson:

Q. These are all the vouchers or statements or whatever you call them that have been furnished by Mr. Rime and Mr. Jensen?

A. Yes.

Q. And are these the originals on which you have based certain calculations which I have asked for?

A. They are.

Q. So the calculations that you were to present are based upon papers of which Mr. Jensen and Mr. Rime have duplicates?

A. I think so.

Q. Will you produce the statement that I have asked for [fol. 399] showing the money paid by the carriers on the cars cleared and so forth since July 1, 1940 by Jensen and Rime?

A. Yes——

Q. Is that bundle of papers the statements that I have asked for?

A. Yes.

Q. And all of the sheets are directed to the same kind of accounting, is that right?

A. Yes.

(Plaintiff's Exhibit EEE marked for identification.)

Q. Showing you Exhibit EEE, that is a series of papers compiled by you on the basis of the bunch of papers that I have just handled and which you called what?

A. Clearance sheets.

Q. Is that a tabulation of facts appearing from those clearance sheets?

A. The list of drafts and the numbers of the drafts were not made up.

Q. From those sheets?

A. Yes.

Q. From what are they made up?

A. They are made up from the draft books.

Q. Have you got the draft books here?

A. I can get them.

Q. These vouchers that you have here, that you produced here, are they stubs or drafts that you have been using in paying this money?

A. The Soo Line are carbon copies; the Great Northern are stubs.

[fol. 400] Q. And in the case of those are the originals, either the original stubs or original duplicate copies of vouchers drawn by you?

A. Yes.

Q. And are all these records that you have before you now in these books, are they the original records of the two railroads for whom you have been working or acting in paying the money referred to on this Exhibit EEE?

A. You say original——?

Q. Well—duplicates—the original stubs or original duplicate copies——.

A. Yes.

Q. And are these figures based then upon these clearance sheets and the original record found here?

A. Yes, sir.

Mr. Eriksson: Again I certainly do not wish to introduce all these but counsel may see them and check them if he wishes.

Mr. Murphy: I have no ambition to undertake that enterprise but I understand that those are the original records from which he made up the compilation and the original records are open to us to check if we see fit to do so.

Mr. Eriksson: Yes——

Q. Now, turn to Exhibit EEE—I notice that there are four shorter white sheets on top of longer yellow papers; of what railroad are those first four sheets?

[fol. 401] A. Great Northern—the list of drafts paid to Norman G. Jensen, customs broker, by the Great Northern Railway.

Q. And the next yellow sheet relates to the Soo Railway, does it?

A. Yes, sir.

Q. And the first sheet is a tabulation of the total amount of money actually paid to him by the Soo Line, is that right?

A. Yes, sir.

Q. And the next series of sheets, what do they show?

A. It starts at July 1, 1940, and I made out a sheet for every month up to date.

Q. Up to date.

A. Up to December 1, rather.

Q. And what do the last sheets show—or what does the last sheet show?

A. The last sheet shows the number of shipments on which brokerage was advanced by the railway companies and the second column shows the number of shipments which were cleared but no advances were made by the railroad companies.

Q. So then, if we read the first four pages of this exhibit we find a detailed statement of the money paid to Mr. Jensen, the defendant by the Great Northern Railroad?

A. Yes, sir.

Q. And next we come to the amount of money paid to Mr. Jensen either in the form of drafts cashed or drafts issued but not cashed by the Soo?

[fol. 402] A. They are drafts issued for those amounts and we are charged up with them.

Q. They are liabilities or charged up to the railroad?

A. Yes.

Q. Whether he has cashed them or not?

A. Yes.

Q. And then follows the statement of shipments cleared by him by the month, is that right?

A. Yes.

Mr. Eriksson: We offer Exhibit EEE.

Mr. Murphy: Let me see it.

Mr. Eriksson: It's to take the place of the original records.

Mr. Murphy: Alright; we have no objections.

The Court: It may be received.

Mr. Eriksson:

Q. That shows that the Soo Line has paid drafts to the amount of $5,558.75?

A. Yes.

Q. And in addition there is held by the Soo on account of a garnishment $3,011.00?

A. Yes, sir.

Q. Now, as to the latter amount there will be no corresponding stubs or drafts for that $3,011.00?

A. No, sir.

Q. The drafts and stubs that you have referred to as being in these books relate to money paid by the Great Northern and the money actually paid by the Soo?

[fol. 403] A. That was actually paid.

Q. And then coming down to the last page the exhibit shows that there were 8,163 cars or shipments cleared by Mr. Jensen for which money has been paid, is that right?

A. Yes, including the garnishment.

Q. Including the shipments affected by the garnishment proceedings?

A. Yes.

Q. And the total number of shipments cleared for which he collected either cash from others or charged accounts against others was 10,160 cars or shipments?

A. Yes.

Q. In the case of those not advanced on by the railroad company they would be either accounts or collections made outside or aside from any collections made from the railroad?

A. Yes.

Q. So there have been approximately two thousand more cars cleared on which the railroad has no record at all than those on which the railroad advanced the fees?

A. Yes.

Q. At the present time are the fees charged against the railroad collected daily or otherwise by Mr. Jensen and Mr. Rime?

A. They are collected daily.

Q. In the case of those shipments which came consigned within your observation to the Union Brokerage Company but delivered to Mr. Jensen how long, if you know, how long [fol. 404] a time transpired between the time he got those and the time they were entered at the customs office?

A. Usually, I'd say, a very short while.

Q. An hour or half an hour?

A. Depending on the trains but if we got a train over at 4 o'clock in the morning and those cars would be set (?) out they'd usually come on the list and be out in the next train which might be six or two hours.

Q. The freight trains which bring in these shipments, do they come entirely during the night time or during the day time—in 1940 and the early part of 1941?

A. I believe they are due in Emerson about 4 a. m.

Q. Four a. m.?

A. Yes.

Q. And how long do they stay in Emerson?

A. They usually get the cut over in about an hour and a half.

Q. And at Emerson, which is the last Canadian port what is done there to clear the shipments for continued transportation?

A. The Canadian export papers are removed from the waybill and filed with the Canadian customs.

Q. And that leaves those designed for American use on the shipment?

A. Yes.

Q. On or connected with the car?

A. Yes.

[fol. 405] Q. Do you know who was on duty at Emerson in 1940, from July on, during the night shift?

A. T. A. Spear was in charge until very recently.

Q. Any other person there that you know of during the night shift?

A. Mr. Carlson was usually there.

Q. Mr. who?

A. Carlson—until about 2:30 a. m., and Mr. Elham part of the time.

Q. Was there a man named Baker connected with the railroad or Mr. Murphy?

A. Mr. Murphy was the agent until some few months ago.

Q. And what was his hours?

A. I can't tell you his hours; it was a day time shift.

Mr. Eriksson: That's all; you may take the witness.

Cross-Examination.

Mr. Murphy:

Q. I understand, Mr. Phillips, you are the cashier for both the Great Northern and the Soo railroads?

A. Yes, sir.

Q. You never were employed in the customs department at all?

A. Yes, before I railroaded I worked for the customs.

Q. How long ago was that?

A. That was before August 18, 1920.

[fol. 406] Q. Now, I don't know whether I understood these railroad terms or not. You know they are not as simple to us lawyers as they are to you as you have been using them every day but when a shipment of any sort originates, we'll say, in Calgary, to make it specific, the shipper makes out what you call a bill of lading?

A. Yes.

Q. In general what is this instrument or thing which you call a bill of lading?

A. That's the order specified by the Interstate Commerce Commission or the Canadian Commission which has to be filled out to move a shipment.

Q. Well, isn't it in the nature of a request or demand on the part of a shipper to the railroad to ship certain things to a certain place?

A. Yes.

Q. That is about what it amounts to?

A. Yes.

Q. And now when the railroad receives bill of lading are there more than one copy of that bill of lading at the time?

A. The shipper receives two of them back after being receipted for by the railroad company.

Q. The shipper receives two bills back?

A. Yes, sir.

Q. How many are there all together as a rule?

A. Speaking of a Canadian railroad and the shipment [fol. 407] crossing the boundary line there are usually four.

Q. Usually four and the shipper gets two back and one of them remains with the railroad office, I suppose, at the point of origin and the other one goes with the train?

A. Yes.

Q. Now, accompanying that bill of lading the railroad company gets, which I understand is in the nature of a request or demand by the shipper, they themselves make out an instrument called a waybill?

A. Yes, sir.

Q. And that goes into the details as to the shipper and consignee and number of the car and type of merchandise and the tariff and all the rest of it?

A. Yes, that's the instrument which moves the car.

Q. That's the instrument on which the railroad company moves the car?

A. Yes, sir.

Q. Now, those two papers are put together, I suppose, the bill of lading and the waybill?

A. As far as to the bill of lading for customs purposes—yes, that's usual.

Q. Well, the conductor is the man who is in charge of those instruments on the freight train?

A. Yes.

Q. Now, there was another instrument which you referred to as the invoices, what are they?

[fol. 408] A. The invoice is made out by the shipper or the owner of the goods showing the value, the amount and—

Q. Details and nature of the shipment?

A. Yes.

Q. That's the invoice and it also accompanies the bill of lading and the waybill?

A. Usually although it can be mailed by the shipper to the customs broker.

Q. Now, you say there was a custom, general custom, of shippers when they wished to designate a particular broker, to make some form of designation on one of these instruments; which one would that generally appear upon?

A. It would be made by the shipper on the bill of lading

but the railroad would have to show it on the waybill also.

Q. Now, then, if a shipper wishes to consign a shipment to a certain broker, we'll say, at Noyes, they should designate in some manner upon the bill of lading the name of the broker?

A. Yes.

Q. And the railroad company would also write the name of that broker upon the waybill?

A. That's correct.

Q. And then when that shipment arrives at the port of entry how would the broker come into possession of the bill of lading; from whom would he receive it?

[fol. 409] A. From the railroad agent.

Q. The conductor, when he arrives, turns these bills of lading and waybills all over to the agent, does he?

A. Yes.

Q. And then Mr. Broker goes there to the agent and asks if there are any bills for him?

A. Yes.

Q. The agent then turns the bills of lading over to the broker, those on which his name is indicated?

A. Yes.

Q. And what does the broker do with it then?

A. The broker?

Q. Yes.

A. He would fill out—depending on the time of day—he would fill out certain forms for the customs so that inspection of the car could be made.

Q. That is, he would fill out some form provided by the U. S. Customs to indicate that the car was there for importation subject to inspection by the customs office?

A. Yes.

Q. And file that with the customs officials along with the bill of lading?

A. No, the bill of lading would not be filed until later; it can be filed as much as 48 hours later.

Q. He would retain the bill of lading for awhile?

[fol. 410] A. Yes.

Q. Well, after the customs have inspected the shipment I suppose they would give some indication that they have passed the car for importation—that is, after their inspection they put a mark on it to show it has been inspected?

A. No, there's nothing of that kind; we know——

Q. You had some way of determining when the inspection is completed?

A. We send men right with them.

Q. That is, the railroad company does?

A. Yes.

Q. Alright—then what does the broker do in order to obtain these advancements of fees and duties from the railroad company; what evidence does he present to the railroad company to get a draft for his brokerage and for the duty?

A. He presents a list, as they were called awhile ago, a clearance sheet.

Q. He brings that sheet, similar to those you brought here, called a clearance sheet, and is there anything else that he brings, any bill of lading or any other evidence?

A. No, not to the railroad company.

Q. He merely brings in a so-called clearance sheet in which he shows that he is entitled to brokerage on certain cars?

A. Yes.

Q. And duty, I suppose——

A. (No answer.)

[fol. 411] Q. —Is it the practice and custom of the railroad company, the receiving railroad company in the United States to advance, in certain cases, the brokerage due to the customs broker?

A. Whenever it is asked for the law provides for that.

Q. That the railroad company pay it?

A. Yes.

Q. And also the duty upon the goods going to the government?

A. Yes.

Q. And the railroad company reimburses itself later, I suppose, from the consignee?

A. If is collected at the time the freight is collected.

Q. And that is the practice that the brokerage fees, wherever it is demanded, and the duty, wherever demanded, is advanced by the railroad company?

A. The Interstate Commerce law reads that custom fees and brokerage fees will be advanced for collection from the consignees.

Q. This instrument which has been brought here called Exhibit EEE——

A. Yes.

Q. You have four sheets of paper on the front of it in which you have three columns of figures on each one of them; the left-hand column, of course, is apparently the date column; the second column is headed "draft number"——

[fol. 412] A. Yes.

Q. —and the third column is headed "amount." You have a total on the first sheet which, I suppose, takes in all four sheets?

A. It does.

Q. In other words you are going backwards here—the total, $1,169.25, that represents the fees advanced by the railroad company to Norman G. Jensen?

A. Yes, sir.

Q. I can't make out the opening and concluding dates here but probably you can tell me.

A. From July 3, 1940——

Q. July 3, 1940? Where it says "1941" should be "40?"

A. Yes.

Q. That is why I was confused—July 3, 1940 to November 30, 1941?

A. Yes.

Q. Is that correct?

A. Yes.

Q. And then we are to gather from that that the railroad companies, that both railroad companies——

A. No, that is the Great Northern Railway——

Q. The Great Northern Railway Company, during that period of time, advanced brokerage to Norman G. Jensen of $1,169.25?

A. Yes.

Q. Now, these other sheets here, do they refer only to the

[fol. 413] Soo Railway Company?

A. Yes.

Q. That is, the yellow sheets listing drafts?

A. Yes.

Q. They purport to give the same information or do they also include duties advanced?

A. No, there's no duties listed on those sheets.

Q. All of the figures then that are seen on here are brokerage?

A. Yes.

Q. Both the Soo and the Great Northern?

A. Yes.

Q. And the total paid then by the Soo Line is shown on this first sheet?

A. That's the recap.

Q. A recapitulation of the succeeding sheets and totals $5,558.75 which represents the brokerage advanced by the Soo Railway Company to Norman G. Jensen during the same period of time that we have referred to?

A. Yes, and paid by drafts.

Q. Paid by drafts?

A. Yes.

Q. Well, was there any other brokerage advanced?

A. There was $3,011.00 in the garnishment.

Q. Well, that hasn't been paid at all?

A. No.

Q. In other words you have been holding that up?

A. Yes.

[fol. 414] Q. Now, you have two sheets on the back end of this exhibit which purport to show—these (indicating) are duplicates, are they not?

A. Yes.

Q. —and it purports to show the number of shipments on which brokerage was advanced and the figures have nothing to do with dollars at all but the figure 8,163 means that there were 8,163 different shipments upon which brokerage was advanced by the railroad company?

A. That's right.

Q. That is both railroad companies?

A. Yes.

Q. And the other column is the number of shipments on which brokerage was not advanced—10,160?

A. Yes.

Q. And that covers both railroad companies?

A. Yes.

Q. Now, did I understand you to say, Mr. Phillips, that you had an independent recollection or memory of certain shipments which were consigned to the Union Brokerage Company at Noyes which were delivered to Mr. Jensen or to Mr. Rime for Mr. Jensen?

A. Yes.

Q. You have some definite recollection of that?

A. I know I handled shipments of that sort and I handled many of the papers for them.

Q. Now, do I understand you to mean that in those in-
[fol. 415] stances—about how many of those instances do you recall or have in mind now?

A. That would be very hard to state; I don't imagine I handled over ten per cent of the original papers but I have seen some.

Q. Well, I'm not speaking about what percentage you may have handled; I mean, how many of those do you recall yourself, basing it on your recollection only, that you handled, if any?

A. I couldn't compute any number on that.

Q. Well, would it be five or fifty?

A. I'd say it was probably in the hundreds but that is guess work on my part; we knew nothing was wrong, that they weren't being handled by the Union Brokerage Company and no track of them was kept or anything else.

Q. Your statement that you knew nothing was wrong, you mean that there was nothing illegal in what was done, is that it?

A. As far as I know.

Q. Did you not tell the court, in substance, that if a bill of lading came with a broker designated on it like, we'll say, the Union Brokerage Company, and that broker was not there to receive it to handle it, before a change could be made the originating railroad would have to furnish a so-called carrier's certificate?

A. Yes.

Q. And the originating railroad in order to acquire the authority to furnish that certificate would have to com-
[fol. 416] municate with the shipper and have the shipper make the designation?

A. That's the way they did it.

Q. In other words, if there is a shipment sent to the Union Brokerage Company and there was no one there to handle it for them some other broker made an application to the forwarding railroad for a shipper's certificate and that forwarding railroad would then have to communicate with the shipper and get the authority to issue the shipper's certificate?

A. Yes.

Q. That is all that amounted to?

A. Yes.

Q. And those are the instances you have in mind when you said there were certain shipments to the Union Brokerage Company handled by Jensen?

A. I believe I specified the date November 5th or Mr. Eriksson did; I don't know personally—I have no knowledge of that being done before—until after November 5.

Q. After the 5th of November, 1940?

A. Yes.

Q. Well, what I mean is that if it was done it was handled in the proper legal manner?

A. I don't know; I didn't handle them.

Q. You didn't even handle them yourself?

A. I handled none of these applications for change in brokers.

Q. The evidence before you or your railroad company either in the form of a carrier's certificate was there, was [fol. 417] it not, in each instance, authorizing the change of brokers?

A. We never saw those; those are filed with the customs.

Q. Those are filed with the customs department so the railroad company pays no attention to that?

A. No, they make delivery to the broker specified when they come with the waybills.

Q. To the broker specified?

A. Yes.

Q. But I'm trying—I'm thinking of a case where the broker specified isn't there to handle them and some other broker appears with the bill of lading. Take, for instance, a shipment sent to the Union Brokerage Company and the Union Brokerage Company has no man there to handle it for them and Jensen or Rime shows up; now, how does he acquire the right to handle that particular shipment?

A. The only way is by the connecting line taking it up with the shipper or the customs would not allow it to be entered.

Q. Yes, exactly; and all of these instances that you spoke about were handled that way, weren't they?

A. I can't tell you that.

Q. You'd have to go to the customs office to find out whether that is true or not?

A. Yes.

Q. The railroad company would honor Mr. Jensen's bill [fol. 418] of lading or clearance sheet regardless of that?

A. We had that order from Mr. Jensen.

Q. That is, if he presented a clearance sheet you would honor it anyhow?

A. We had that order, yes.

Q. What order?

A. That Mr. Eriksson showed me here.

Q. Oh, you mean after you had that paper?

A. Yes.

Q. I see. Alright, now all of the drafts or vouchers that are mentioned in this Exhibit EEE—all those that you have listed, those were all made out to Norman G. Jensen, weren't they?

A. Yes.

Q. None of them made to Mr. Rime in his name at any time?

A. No.

Mr. Murphy: I think that is all.

Redirect examination.

Mr. Eriksson:

Q. Mr. Murphy and perhaps I too have been talking about shipments; those that you have listed on Exhibit EEE are the cars, so many cars?

A. Not exactly; they are shipments as near as I can specify.

Mr. Murphy: They needn't be full cars and they'd be a shipment—might be less than a car?

[fol. 419] A. Well—every one is a shipment——

Mr. Eriksson:

Q. Well, these 19,000 shipments, in round numbers, that we in our inexpert way talk about, are they so many or what are they; will you please explain that?

A. Oh, I get it; they would be shipments in this way that there may be several in one box car of merchandise but they would be handled precisely as a car load and there may be, for instance, as in the case of telepgraph poles, two or three cars covered by the one length of poles and they'd be handled as one shipment.

Q. So that sometimes there are two or three cars counted as one shipment and again just an item in a car?

A. Yes.

Q. Now, with respect to this paper that I have here, Exhibit Q, from your last answer to Mr. Murphy's question, is it true that you relied on that paper in delivering the shipments consigned to the Union Brokerage Company to Mr. Jensen as its representative there?

A. Yes.

Q. And you just acted upon that as if he was working for the Union Brokerage Company?

A. Yes.

Mr. Eriksson: That is all, Mr. Phillips.

Mr. Murphy: That is all.

(Afternoon recess.)

[fols. 420-423] Norman G. Jensen recalled for further cross-examination under the statute.

* * * * * * *

[fol. 424] Q. You testified yesterday, I believe, that when these shipments came consigned to the Union Brokerage [fol. 425] Company you took them and took them over to Emerson there to be transferred by some official of the C. P. R., is that right?

A. I testified that my instructions were to take them back there knowing that I wouldn't be there much myself.

* * * * * * *

[fol. 426] Q. Didn't you leave some money with one of those men?

A. We have.

Q. How much did you leave?

A. I don't remember.

Q. With whom did you leave it?

A. With the agent of the C. P. R. as Mr. Rime tells me: I never left any; Mr. Rime left it there.

Q. And you did leave a stamp there?

A. We left a stamp there.

Q. And that stamp was used to change the certificate from the Union Brokerage Company to Norman G. Jensen?

A. It was used to fill in the certificate on those bills of lading that were designated as coming to me.

Q. After they'd been—after the carrier's certificate had been changed?

A. We aren't thinking in the same line of though-, Mr. Hermanson.

Q. Well how do you know? I'll put it this way so that we will get together on the same track. You say that—you testified that you had a stamp left there?

[fol. 427] A. Yes.

Q. That stamp wouldn't be and was not used until a change had occurred in a bill of lading consigning, for brokerage purposes, the shipment in question, to a broker located at Noyes, isn't that right?

A. No, the stamp was left there, if I may use this (indicating).

Q. You are now speaking of the last sheet of Exhibit DDD?

A. Yes—some shipments coming to be cleared by Norman G. Jensen, they are written throughout the body of the bill of lading and the customs has maintained that this certificate (indicating), has to be filled out as well and since they maintained that—we always maintain that the customs is right whether we agree with them or not—we gave the C. P. R. agent a stamp to fill this in so that he wouldn't have to write it in over there. They maintain that has to be filled in before it comes across the line.

Q. You mean the C. P. R.?

A. The customs maintains that has to be filled in before it leaves Canada.

Mr. Murphy: You are speaking now of the *ac*rrier's certificate?

A. The carrier's certificate on the bottom of customs bill of lading, C. P. R. Form 9.

Mr. Eriksson:

Q. What other customhouse broker has, during this time, [fol. 428] gone through that kind of practice?

A. I don't know.

* * * * * * *

A. I can't think of any such practice.

Q. If I have followed you correctly you testified that shipments which in the body of the bill of lading designated you as the customhouse broker were nevertheless, according to the customs regulations or rules, required to be stamped at Emerson before the car could go into Minnesota, is that right?

A. Well, not necessarily before the car could come in here but the Collector of Customs ordered that the bills of lading must be marked or the certificate at the bottom of the bill of lading must be marked showing the broker and that marking must be done by the incoming carrier.

Q. And when was that order made?

A. I don't just know when that order was made.

Q. When were you advised of it?

A. I don't remember that date either.

[fol. 429] Q. By whom were you advised of it?

A. The collector himself told me that.

Q. Name him.

A. Mike E. Christianson.

Q. That is the one that is deputy collector of customs at Noyes, Minnesota?

A. At Noyes, Minnnesota.

Q. And you have no idea when that was made—when that order was made?

A. Made about the time that I started up at Noyes—maybe a few days before—maybe a week or two before or whenever I happened to see him.

Q. But if these bills of lading definitely designated you as the broker consignee what reason have you to testify that such papers needed any altering or changing or doctoring of any kind?

A. Just the order of the Collector of Customs. He said that certificate must be filled out and when that's his order we plan to live up to it.

* * * * * * * *

[fol. 430] Q. Whatever meeting it was, is it true that [fols. 431-434] you were called to Winnipeg on account of the practices that you had pursued at Emerson to get business from other brokers, business consigned to other brokers?

A. The way you put it I'll have to answer it no.

Q. Well, then, if there is anything the matter with the question it is because I don't know the particular time and evidently you do know so tell it in your own way.

A. I was called to Winnipeg to attend a meeting of several brokers along with the C. P. R. agent from Emerson and I attended that meeting.

Q. Who else attended that meeting?

A. Mr. Rime, Mr. Mackay——

Q. When was that meeting?

A. Sometime during the summer; I don't remember just what date.

Q. 1941?

A. 1941.

Q. And as a result of that meeting this kind of practice that you have described has been absolutely forbid at Emerson, isn't that right?

A. Well, there was a change in practice of stripping the bill of lading at Emerson either prior—or at this particular time and I don't know if it had any connection with the calling of that meeting or not.

* * * * * * *

[fol. 435] Curtis M. Rime, one of the defendants, called by the plaintiff for Cross Examination under the statute, was duly sworn and testified as follows:

Mr. Eriksson:

Q. Mr. Rime, your name is Curtis M. Rime?

A. Yes, sir.

Q. How old are you?

A. Thirty-four.

Q. And you have been the principal of the Portal school——

[fols. 436-437] A. Yes, I have.

Q. —for how many years?

A. Three.

Q. What college degree, if any, have you got?

A. Valley City State Teachers College.

Q. And any other degree?

A. No, only advanced work on my Masters at the University of Southern California.

Q. The University of Southern California?

A. Yes.

Q. And are you a citizen of North Dakota or a citizen of Minnesota?

A. At the present time I'd be a resident of Minnesota; I think that's what you meant.

. . . . . .

[fols. 438-439] Q. He came to you—and after he had talked with you and you with him about that enterprise, did you then confer with him about the nature and responsibilities of that business?

A. Well, after I found it out I tried to—finally tried to find out what to do or he showed me what to do.

Q. And that was shown to you in the Union Brokerage Company office?

A. Yes, it was.

. . . . . .

[fol. 440] Q. Well, had you come to an agreement or understanding on it by the 29th day of June, 1940?

A. Well, we had come to an understanding that I was supposed to work for Jensen, yes.

Q. And the work you were to do for Jensen was to handle business that had been handled for customers or shippers at Portal?

[fols. 441-442] A. Well, I was supposed to handle the business for Jensen.

Q. At Portal?

A. No, at Noyes.

Q. Yes, that's right; and the business you were to handle for him at Noyes was the business to be gotten from the customers of the Union Brokerage Company prior to July first?

A. No, that I wouldn't know.

Q. You found out afterwards though, didn't you?

A. Found out afterwards——

Q. You found out afterwards that they had that business and that the business which you folks received at Noyes, Minnesota, was business from the people that had formerly done business with the Union Brokerage Company at Portal?

A. Yes, I believe some of them were.

Q. Most of them, if not all, isn't that right?

A. I still couldn't answer; well, I'll agree with you.

Q. Well, I don't want you to agree; isn't that the truth—isn't that the truth that the business that you have done at Noyes, Minnesota, came from the customers listed on Exhibit F, which is the list of customers of the Union Brokerage Company at Portal?

A. I have never seen Exhibit F.

Q. You haven't seen that?

A. No.

* * * * * * *

[fol. 443] Q. I don't think so but we will leave that subject for the present. Now, in actual operation of the business at Noyes, Minnesota, you saw and understood that Mr. Jensen, whenever he was around, usually stayed either on the Canadian side or the North Dakota side of the boundary, isn't that right?

A. Yes, that's right.

Q. And you understood that he did so because he didn't want to be on the Minnesota side?

A. I know he was kidded about it.

Q. And he gave directions for the transaction of business from either the Canadian or North Dakota side?

A. Not always.

Q. Many times?

A. Well, not so many times either.

[fol. 444] Q. Sometimes?

A. Sometimes he did, yes.

Q. And then when you began to operate the business at Noyes, you know of your own knowledge, don't you, that the shipments came consigned to the Union Brokerage Company?

A. I know there were some, yes.

Q. There were a good many in the course of the months?

A. No, I don't believe that.

Q. Whatever there were, they were taken over by you or Mr. Jensen, isn't that right?

A. Yes.

Q. And you understood and admit now that you were able to do that because of that paper that Mr. Jensen had left with the Chief Clerk on the 29th of June, 1940?

A. I know that now, yes.

Q. Well, you did at all times, didn't you?

A. Not necessarily, no.

Q. Not necessarily?

A. No.

Q. And those shipments or the evidences of such brokers consignments were taken over to the C. P. R. by you or by Mr. Jensen, isn't that right, through the Canadian side?

A. That's right.

Q. And there you prevailed or secured the—prevailed upon the officials of the C. P. R. or secured their consent to have the certificates changed on those Bills of Lading so that you could make entry?

[fol. 445] A. Not necessarily.

Q. What do you mean by "not necessarily"; I would like to have positive answers; you did, didn't you?

A. Oh yes, I did.

Q. Yes—and you understood all the time that without such change you couldn't under your power of attorney or Mr. Jensen couldn't use—couldn't under his license broker those shipments?

A. That's right.

* * * * * * *

Q. Why did you resort to that practice?

A. Because they refused to allow me to make entry at the customhouse.

Q. That is, the custom officials refused to let you act as broker on the shipments consigned to the Union Brokerage Company?

[fol. 446] A. Yes.

A. And so, to avoid that regulation, you did, and Mr. Jensen did what you have just described?

A. Yes.

Q. And the thing you did consisted of what we have talked about this afternoon, namely, that the stamp was left with the man in Emerson, isn't that right?

A. It was.

Q. And did you or Jensen deliver that stamp?

A. I believe I delivered it.

Q. And from who did you get it?

A. I got it from the office.

Q. And who provided it for the office?

A. Jensen.

Q. And that stamp contained what—have you got the stamp here or can you tell us what was on that stamp?

A. Norman G. Jensen is all.

Q. Is that all?

A. And then too—Norman G. Jensen and Noyes, Minnesota.

Q. And that stamp was gotten before or after July 1, 1940?

A. It was either just after I came over—I believe it was sent up by the company in Fargo.

Q. In other words, it was ordered by Mr. Jensen from some stamp maker at Fargo to be on hand July 1st?

[fol. 447] A. That's what I would say—yes.

Q. And it came either the first or second or third of July, 1940?

A. Well, I believe that's right.

Q. And since that time it was used until some date this fall, isn't that right?

A. No, that's not true.

Q. How long was it used?

A. I don't know; I believe it's still used.

Q. Well, that's what I just said, it's been used ever since it arrived until the present time?

A. That's right.

Q. And the purpose for its use has been the same all the time, has it not?

A. Oh, I don't know about that;—has to be used to properly make out a bill of lading, that's right.

Q. And that is done to enable you or Jensen or both to clear shipments that otherwise you couldn't clear because of the original consignment?

A. No, that isn't exactly true.

Q. Well, give us the exact truth as you have it because you say it isn't exactly true; in what respect is it not true?

A. If a bill of lading comes with the name "Norman G. Jensen" for clearance written across the face of it, the customs refused to accept it maintaining that is not correct but if the contract, as I call it, in the bottom, is filled in [fol. 448] then they will accept it and they have told me that I have to have the incoming carrier fill in this contract.

Q. Now, is that what you mean now?

A. Yes, that's right.

Q. And who has told you that?

A. I was—they refused to allow me to make entries on these bills of lading and I have to take them to the C. P. R. to get them——

Q. Who told you that they couldn't be entered or cleared without that?

A. The Collector of Customs.

Q. What's his name?

A. Mr. Christianson.

* * * * * * *

[fol. 449] Q. You said that you have used this stamp partly because or at least you have used it because you said the Collector of Customs has given you some instructions?

A. He didn't give instructions; he refused to allow——

Q. He refused to allow the entry?

A. Yes.

Q. That's right—now, my question is this: is it not true that when shipments came consigned to the Union Brokerage Company, for example, or some other agent or some other broker whose business you or Jensen claimed, that in such cases these bills of lading were taken over and the stamp used to get the proper carrier's certificate so that clearances could be made?

A. That's true.

Q. And that practice has prevailed since July 1, 1940?

A. That's true.

Q. And you are engaged in that practice now?

A. We are.

[fols. 450-451] Q. Who, if anyone, connected with the C. P. R., has assisted in the execution of that practice?

A. Well, when we come over there they take it for granted that—it's done under their supervision and I do it myself.

Q. You do it?

A. Yes.

Q. What do they do to either approve or disapprove or disapprove of that?

A. Well, if we received them at the Noyes depot naturally they take it for granted that they are ours.

Q. At the Emerson station?

A. Yes.

Q. And if you get them at the Emerson station then what do the officials of the depot there do?

A. Well, they make sure that they are ours, or Jensen's, and then they give them to me.

Q. And what do they do or what do you do to assure them that that's correct?

A. I fill them in properly if I know they're supposed to be Jensen's.

Q. You fill them in right there at Emerson?

A. Yes.

Q. You say when you know they are Jensen's?

A. Yes.

[fol. 452] Q. Well, say in July, a year ago, in July, 1940, when you got a shipment consigned to the Union Brokerage Company as broker consignee and you took it over for changing to Norman G. Jensen and the application of that stamp, what did you do then?

(Last question read to witness.)

A. I didn't get it.

Q. All right, if you don't understand it I'll try it again; you have testified, have you not, that in July and for sometime after that shipments would come consigned to Union Brokerage Company, that's right, isn't it?

A. There were some, yes.

Q. And in such a case, you would take those over or do something with them to get them cleared by Jensen because the customs had ruled you couldn't clear them unless such a change was was made, isn't that right?

A. That's right.

Q. Now, I'm asking you to recall one such shipment and answer this question: What did you do to secure the change?

A. You mean what did I do at Emerson to secure the change?

Q. Yes, or at Noyes, or both?

A. Well—what did I do to——?

Q. To get these papers changed so that they could be cleared in Jensen's name?

A. I took them back there and said——

[fol. 453] Q. Took them back where?

A. To the C. P. R. and I said—I told them that the customs refused to clear these shipments or wouldn't

let me make entry on these shipments until they were properly filled in.

Q. And then what did you do?

A. And I gave—well, I gave them a stamp first; it would be hard to write them all in so I gave them a stamp in place of writing them all out.

Q. And besides giving them the stamp to use what else was done?

A. That was all.

Q. Well, didn't you detach some papers and substitute another?

A. No.

Q. What did you do to the papers that previously had been unacceptable to the customs?

A. Merely filled in the contract on the bill of lading.

Q. We have here or I have here a dummy set up of papers for the purpose of showing how a shipment is cleared; now, will you please take this, which is identified as Plaintiff's Exhibit DDD and tell us where the change was made, what it was before the change was made and what it was after the change was made by the use of this stamp under your control turned over to the C. P. R. officials?

A. Well, if a bill of lading—it is written in somewhere in the body here (indicating) that it is to be cleared by some-[fol. 454] one, the U. S. Customs refused to accept it because it is no good they claim.

. . . . . .

[fols. 455-456] Q. The number of papers was so considerable coming in that manner that in the interest of time saving you used the stamp to put Jensen's name on?

A. Yes.

Q. And who was the agent at the C. P. R. station at Emerson with whom you worked most of the time in effecting these changes?

A. That might be anyone who happened to be there; Mr. Murphy was there at that time.

Q. But the man in the night time—freight usually came in during the night, didn't it or in the early morning?

A. At what time of the year?

. . . . . .

[fols. 457-463] Q. Did you follow and carry Mr. Jensen's instructions out when you did so?

A. Well, I believe they were his instructions.

Q. You executed them?

A. Yes.

Q. To the best of your ability in doing this as well as other things?

A. Yes.

. . . . . .

[fol. 464] Q. Didn't you understand it that the paper was authority on which the railroad officials acted in delivering you shipments or bills of lading consigned for clearance by the Union Brokerage Company?

(Last question read to witness.)

A. As far as I know it is.

. . . . . .

[fol. 465] Q. And have you the deposit slips and monthly statements from that bank?

A. I have.

Q. And will you produce those also?

A. I'll try to get those.

Q. I don't want to ask many more questions in regard to the clearance of shipments but isn't it true, Mr. Rime, based upon your own knowledge and experience at Noyes, Minnesota, that unless the bill of lading is changed in some manner, in cases such as we have discussed, if you remember that, there can be no such thing as clearing the shipment by another broker—if you don't understand that question I'll put it in parts?

A. Put it in parts.

Q. Well, take a shipment consigned to the Union Brokerage Company at Noyes in July or August, 1940, one of those shipments that came consigned to the Union Brokerage Company as broker consignee, we'll say, you understand that?

A. Yes.

Q. And then you want that to be transferred to Norman G. Jensen, we'll say, you understand that?

A. Yes.

Q. And now, isn't it true, that in that case you couldn't secure the transfer of that shipment to Norman G. Jensen. [fols. 466-467] for brokerage purposes unless the bill of lading itself was changed in some material particular?

A. You mean the entry couldn't be made unless it was changed?

Q. And you couldn't get the entry changed so as to act as broker without changing the bill of lading?

A. That would have to be done yes.

Q. Now then, bearing your last answer in mind, is it not true, that when you went over to Emerson that you, either alone or in conjunction with some one of the officials of the C. P. R., made some material change in the bill of lading?

A. I would say it was changed, yes.

Q. And in doing that you understood that you were doing the irregular thing, isn't that right?

A. No, I didn't.

* * * * * * *

Q. You never wired in a case of that kind the shipper named in such a bill of lading for authority to make the change, did you?

A. I never wired, no.

[fols. 468-479] Q. Well then, I want to have you understand that my original question on that subject related to cases where you had brought the papers to Spear over at Emerson for changes—did you ever see anybody wire for instructions in regard to changes that you desired?

A. I never watch them do those things.

Q. Well, did you see any?

A. No.

* * * * * * *

[fols. 480-481] NAN W. ANDERSON, called as witness in behalf of the plaintiff, was duly sworn on oath, and testified as follows:

Direct examination.

* * * * * * *

[fol. 482] Q. You were present, of course, at the meeting held on November 5, 1940?

A. Yes, I was.

Q. Where was that meeting held, in Mr. Jensen's office or in Harry Kramer's office?

A. It was held in Mr. Jensen's office.

Q. When, in the course of that meeting, did you find out that the permanent books of record of the company, such as ledger, journal, bank books, had disappeared?

A. Almost immediately after we arrived.

* * * * * * * *

[fol. 483] Q. Now, at that meeting, can you recall what Mr. Jensen said on the subject of an agreement with Mr. Mackay?

A. He said that there had been an agreement and that Mr. Mackay showed it to him at his home.

Q. And did he explain to you at that meeting what that agreement provided?

A. He said that the Union Brokerage Company couldn't operate in District 34, which included Noyes, and he said that Mr. Mackay was not to operate in Portal.

Q. And what, if anything, did he say about the amount of business done at Noyes?

[fols. 484-555] A. He said there was a very, very small amount of business done at Noyes—that he hardly took in enough to pay Mr. Rime $80.00 a month.

* * * * * * * *

Q. And what was said according to your recollection by Mr. Mackay and Mr. Jensen, if anything, in regard to this alleged agreement?

A. Well, Mr. Jensen said that Mr. Mackay had showed him the agreement and Mr. Mackay, of course, said he didn't because there was no such agreement and there never had been.

Q. Had you ever heard or known of any such agreement before?

A. I never had.

* * * * * * * *

[fol. 556] William F. Mackay, sworn as a witness in behalf of the plaintiff, testified as follows:

[fol. 557] Direct examination.

Mr. Eriksson:

* * * * * * * *

Q. And what is your business?

A. Well, I have several businesses; I am Supervisory agent for the Soo Line Railway Company, for the Great Northern Railway Company and for the Railway Express Agency and I am also the United States Customhouse Broker——

Q. Now, the first position, I hadn't known about that before; what was that first please?

A. Supervisory agent——

Q. Will you please explain, in a general way, what that covers?

A. Well, my work has been mostly special work for the department and—the traffic department of the Great Northern and Soo Line Railways; they have depended on me [fol. 558] for customs laws and wherever they had had trouble in respect to them they have asked me to come in. I am away from home perhaps a third of the time.

Q. I see—and how long have you been supervisory agent for these two roads?

A. Since 1905.

Q. And have they had, during all this time, a common depot?

A. They have.

Q. And the trackage for the service of the freight, is that common property or distinct?

A. As far as the buildings are concerned they own fifty percent.

Q. Each owns——

A. Each company owns fifty percent; they have their own right of way and their own tracks.

Q. I see—and how long have you been a customs house broker?

A. Forty years.

Q. And have you been such customs house broker for the forty years at Noyes or prior to then where were you located before?

A. Thirty-five years at—thirty-six years at Noyes and the balance over at St. Vincent which is four miles from Noyes.

Q. I see—and St. Vincent, that is in North Dakota or Minnesota?

A. Minnesota. That used to be the port of St. Vincent for a number of years; after the Noyes station was opened [fol. 559] it was still the port of St. Vincent for the reason

that it took an Act of Congress to change the name of the port.

Q. And that has been discontinued as a port of entry then for sometime?

A. Yes, sir.

Q. Are you familiar with the various developments of the laws relating to the handling of customs?

A. I am.

Q. Are you familiar with the Tariff Act of 1930 as well as with the modifications effected by that law?

A. I am.

. . . . . .

Q. Now, it already appears in evidence that, and that is your understanding, that District Number 34 includes [fols. 560-561] at least Kittson County within its borders?

A. It does.

. . . . . .

[fol. 562] Q. Now, returning to June 29, 1940, where did you meet Mr. Jensen?

A. On the night of June 29, 1940.

Q. Where?

A. Where at—at my home; he came to my house.

Q. Late in the evening or early in the evening?

A. It was late in the evening; I imagine around 8:30, it was just beginning to—it was dusk.

Q. All right—now please tell the conversation between you and Mr. Jensen on that occasion?

A. Well, Mr. Jensen introduced himself to me; I didn't recognize him and he said that he had met me once before and that he had come over to Noyes to see me—that they were following the business to Noyes from Portal——

Q. Following the business from——

A. —their business from Portal to Noyes.

Q. I see——

A. And Jensen—and intended to open an office at Noyes and he wanted me to agree not to handle or engage in any of the west coast business and if I'd agree not to handle any [fol. 563] of that business, he would agree not to handle any of the business that I'd been handling and I told him that I didn't think that would work very well, that some of the shippers that had shipped from the coast through

Portal had also been shipping through Noyes and that I had handled some of the business for years through Noyes and I asked him what I was to do if some of these shippers should write to me and ask me to handle the business and he said, "Tell them that you don't handle that business and I'll tell your clients the same if they ask me to handle theirs," and he told me that he had talked to Mr. Plow, the General Freight Agent of the Canadian Pacific Railway and told him that he was opening an office at Noyes to follow their business there from Portal——

Q. Is that what he said to you?

A. That's what he said to me and that Mr. Plow had told him that the railroads would not tolerate any cutting of charges by brokers, that it interfered with their business and he'd asked him to arrange to attend a meeting that Mr. Plow intended to have called in Vancouver—a meeting of brokers for the purpose of agreeing to uniform charges and that he'd told Mr. Jensen that he was to increase the charges to what the other brokers had been charging because Mr. Jensen had come into Portal and cut charges there and he said that Mr. Plow wanted him to go immediately but that he couldn't go for a few days, he [fols. 564-568] had to go back to Portal first and he did that and went and he was hardly gone from my Office when Mr. Plow called me on the telephone and told me that——

. . . . . .

Q. And was any agreement of that kind or any other kind involving such an arrangement shown, discussed or handled in any manner whatsoever?

A. No such thing was ever talked on; to the contrary I asked him if they were coming over to open an office at Noyes why they didn't let us act as their agent and he said, "I never thought of that."

Q. Did you ever have any such agreement with the Union Brokerage Company?

A. Never at any time.

Q. What's that?

. . . . . .

[fol. 569] Q. Now, at the present time, you are a director of the Union Brokerage Company?

A. I am.

Q. And acting as its agent, is that right?

A. That's correct.

Q. In the business way at Noyes, Minnesota?

A. That's right.

Q. And since when have you been such agent?

A. I can't give the exact date of that but it was when Harry Kramer left the company and I accepted the position as director to save—to recover the business that had been lost through Jensen.

Q. We have the date of Harry's resignation so we can cover that alright——

* * * * * * *

[fol. 570] Now I'll show you Plaintiff's Exhibit DDD which is a dummy entry, as I call it, and my knowledge of this business is so small that I hardly dare to speak about it but, in order to make the record clear, especially with respect to bills of lading, their make-up and significance and the carrier's certificates that have been talked about to some extent, I wish you would take this Exhibit DDD and explain to the Court if there is a bill of lading attached and what a bill of lading shows as the shipment begins?

* * * * * * *

[fol. 571] Q. This exhibit is not received in evidence because I don't want to offer it until it has been identified as to each part; first of all, is this DDD an illustration of an entry from its inception to its completion?

A. Yes.

Q. Now, considerable has been said about a carrier's certificate and Mr. Phillips and Mr. Jensen, I think, agree that the printing on the last page of this dummy, printed in red is a sort of a carrier's certificate, now, is there more than one kind of a carrier's certificate used?

A. Well, I'll tell you; a carrier's certificate is not required [fol. 572] at all; the only intention of that is to inform the collector of customs who has the authority to make the entry; now, it isn't necessary to have a carrier's certificate on a bill of lading if the bill of lading itself shows any-

where that it is consigned to someone the shipment, under the law, is deemed to belong to the consignee.

Q. That is the broker consignee?

A. Well, either one——

Q. Now——

A. —sometimes an importer might want to make his own entry and he wouldn't show any broker's name; he would simply consign the shipment to himself and he would appear at the customhouse with the bill of lading and present it and make the entry in his own name.

Q. Is there anything in the law or regulations which permit a change in that certificate or bill of lading from one consignee to the other?

A. Yes. Can I explain how that came about in the first place?

Q. Yes.

A. Previous to the 1930 Tarjff Act the Collector required the original bill of lading as authority for making the entry and that caused so much trouble—the importer had to give bond for the production of that bill of lading at a later date—and in many cases the original bill of lading couldn't be produced because it was used commercially and it made [fol. 573] so much trouble that they changed the law in 1930 and permitted entry either on the bill of lading or a true copy of the bill of lading certified by the carrier to be a true copy or else on a carrier's certificate certified—certifying that the shipment was consigned to so and so for customs clearance and the idea of that was the collector—it relieved the collector from all responsibility, that is in permitting someone to make an entry because the carrier who issues a carrier's certificate is held accountable and if anyone sustains a damage though the act of the carrier in issuing that carrier's certificate the carrier is liable for that and the carrier is not supposed to issue a carrier's certificate except in accordance with the waybill which is in the possession of the carrier.

Q. Now, the invoice—I am not so clear on the invoice—is the invoice attached to the bill of lading and waybill or is it made up at the station?

A. As I recall the bill of lading is attached—there are invoices—copies of the invoice any way attached also but sometimes the invoices come by mail.

Q. Sometimes the invoices come by mail?

A. Yes.

Q. And the first paper attached to that Exhibit DDD, will you kindly explain that?

A. You mean——

[fol. 574] Q. That first little paper in the corner (indicating?)

A. Oh, that is a card that is filed with the entry, where there is anything lacking, that is, missing documents such as a consular invoice that is to follow later; you have six months in which to produce that, under bond, and this card gives the collector authority to charge the amount *up* against your bond for the production of that missing document whatever it may be.

Q. Now, just one more question on that—I believe that the law provides that the broker has 48 hours in which to clear a car or shipment, is that right?

A. That just depends if he has what is called an immediate delivery bond; under that bond he has the right to delay his entry for 48 hours but he must get it within the 48 hours or he is penalized the value plus the duty.

Q. And do you know what kind of a bond Mr. Jensen has filed at Noyes?

A. He has an immediate delivery bond filed.

Q. And a bond—all bonds of the brokers have to be filed at the port of entry where he does his business, is that right?

A. Well, they have changed that recently and they're filing them now in the district office.

Q. In the district office?

A. That is, in the collector's office—these sub ports are in charge of deputy collectors and the collector's office is [fol. 575] in Pembina, that is the district office.

* * * * * * * *

Q. Now then, by stamping the invoice or signing the name of the broker to the invoice and leaving that with the bill of lading and—the original invoice or duplicate—then does the collector dispatch an inspector to inspect the shipment to see——

A. No, he doesn't deliver the bill of lading; he delivers one copy of the invoice and notes on the back in some way that he has authority to clear that shipment then the inspector goes on and makes an inspection of the shipment

and the shipment is released and, as far as the railroad is concerned, and it goes forward.

Q. In practice then that service of the broker aids the interstate and foreign commerce through the ports?

A. Yes.

Q. Now, there has been some talk about the papers that the broker must keep and I am not quite clear—I think Mr. Jensen said that the inspector, Mr. Nelson, had the right [fol. 576] to O. K. the kind of records a broker is to keep; do you know what the rules are on that subject?

A. Yes.

Q. What is it?

A. The 1930 law required the customs broker to keep records on a form that the government had gotten out—you presented it here in evidence the other day—and if he made application within sixty days from the date of that act, that is the 1930 Tariff Act, he might be excused provided he was keeping other records that gives substantially the same information as is required in that form and when a broker makes application the collector——

Q. Is that in writing? Is that in writing, that application?

A. Oh, yes. The collector then sends that application to the special agent in charge of the treasury department in St. Paul, that is for our district, and he sends out an inspector to examine the broker's records and if he considers them adequate and they meet the requirements of the law he makes a report to—of that—to the collector and the collector writes the customs broker then and tells him that he is excused from keeping the record on that for but that he must not change his records to any other system without first giving notice to the collector.

Q. And the inspector, has he any right to pass judgment on the adequacy of those records?

[fol. 577] A. Well, he makes a report to the collector as to whether, in his opinion, the records comply with the requirements and give the information required on that sheet.

Q. And those records, as I understand it, have to be kept open for inspection for at least five years?

A. Not less than five years.

Q. Speaking now of the re-routing, it already appears that the routing of shipments was changed by the C. P. R. and, by the way, are you acquainted with and interested in

the C. P. R. and the Soo Line so as to be able to tell whether one is a subsidiary of the other or not?

A. I am.

Q. What is the fact?

A. The Canadian Pacific Railway owns 51 per cent of the Soo Line and controlled the Soo Line.

Q. Now there was, as has appeared from the testimony, a change in the routing of shipments of merchandise from Canada into the United States, as far as this district is concerned, from Portal to Noyes?

Q. In anticipation of that change was there any prepara*tion or improvement made at the station in Noyes?*

A. Yes, I think it would be in April or March the officials [fol. 578] came to Noyes and consulted with me and wanted to know what, in my opinion, what facilities they would be required to put in at Noyes in order to handle the increased business and they told me that the Portal business would be likely about twice as much as the business that had been moving through Noyes and then some little time later they put in tracks at a big expense and fixed up the yards and put a lot of money into it.

Q. These doings were publicly noticed?

A. Yes, the whole country knew that.

Q. And when that change became effective what influence did that have upon the business at Portal?

A. Well, it took practically all of the southbound business away. The Canadian Pacific they issued a new tariff routing the business through Noyes and they told me that the only business that would be going through Portal after July 1st would be shipments to local points in North and South Dakota.

Q. So that for all practical purposes no brokerage business was left at Portal when this change became effective?

A. Just odd shipments.

Q. And this change became effective on July 1, 1940; as far as the railroad is concerned shipments originating in British Columbia, say, would come, for the first time, through Noyes at what date?

A. We had occasional cars through Noyes before that [fol. 579] change from British Columbia but not many because the C. P. R. took a long haul where shipments come through Noyes instead of going east on their line, they lose some two or three hundred dollars in freight charges.

Q. Well, what I was trying to get at is this: suppose a shipment was started in Vancouver, British Columbia, say, on July 1st, and, effected by this change in routing, when would that car come through Noyes?

A. Well, I would say from four to six days after it leaves the coast.

Q. Four to six days?

A. Yes.

Q. And incidently, how many roads run through or enter Noyes?

A. Well, there are four roads runnnig there in and out—five roads.

Q. As supervisory agent are you in charge of the personnel in the depot for the two roads operating——

A. Supervisory charge but I have a chief clerk who is responsible for the handling of all the railroad work and I don't interfere with that or have any thing to do with it unless something out of the ordinary comes up and they ask me what to do in this case—I do no routine work, railroad work.

Q. I think I'll ask you to explain what happens at the port of entry, which in this instance is Emerson—I ask you to briefly refer to that——

[fol. 580] A. With reference to what—to the handling of papers or——

Q. Yes, is there any power under this law or the law affecting freight transportation in Canada authorizing any local agent to change the bills of lading or waybills or invoices from one broker to another?

A. No, absolutely no.

Q. If any such a thing is done over there, is that legal or illegal?

A. Illegal.

Q. Mr. McKenzie's name appears on one of the exhibits here—who was Mr. McKenzie?

A. Mr. McKenzie was the chief clerk for the Soo Line Railway and for the Great Northern Railway; he had been there for 25 years in that capacity.

Q. And he died?

A. He died on March 10th.

Q. This year?

A. Yes.

Q. 1941?

A. 1941.

Q. And did Mr. Phillips succeed him then or had he been chief clerk?

A. No, Mr. Phillips is cashier; he's not the chief clerk, he is the cashier and has been there for, I think, over—I think he's been there about 22 or 23 years.

Q. Do the records of the customs office disclose the fees or the duties exacted from the——

[fol. 581] A. Just the duty; the collector has nothing to do with fees. Fees are a matter of agreement between the broker and his client; there are no set fees.

. . . . . .

[fol. 582] Q. Yes; Mr. Jensen or Mr. Rime, I don't know who, has testified that the brokers business was hazardous, what have you to say as to that?

A. Well, I certainly think it's hazardous because they called on me for $76,000.00 two years ago.

Q. And will you kindly explain why it is hazardous and how the hazard arises?

A. Well, the broker's bond is held when you make an entry; you deposit it with the collector for what they call estimated duties—that is, they are not final and the collector has the right to suspend liquidation of entries—the collector of customs has the right or the government, you might say, has the right to suspend the liquidation of the entries as long as it likes; there is no limit to the time and those entries involving the $76,000.00 that the government claimed under the Dumping Act it was claimed that the shippers, importers had imported a lot of wheat flour and had sold that in the United States at a lower price than the foreign market value and under the Dumping Act they came back after 17 years, they suspended liquidation of those entries for 17 years and held my bond and they called on me for $76,000.00; they called on the broker over at Ranier for $125,000.00 or some such sum and those entries were unlaw-[fol. 583] ful and illegal from the very beginning but in spite of that the government insisted on that money being put up and when you file a process you must put up the money that the government asks for whether it be right or wrong, you must first hand them over the money before your case can be heard in the U. S. Customs Court and if you file a process and deposit the amount of money that is

claimed by the government, within 60 days from the date of entry, then that brings your case into the U. S. Customs Court; then you present your evidence there and that Court consists of the judge and United States Attorney and a court reporter; they start out from in New York and go all over a certain district and they take the evidence all back to New York and it is gone over by a board of three judges; the three render the decision usually from six to eight months after the hearing.

. . . . . .

[fols. 584-593] A. Yes. The customs laws are filled with technicalities and the only way that I can keep up on that is to read Court decisions, treasury decisions, we get them in pamphlet form each week and if you don't keep up on those you are just out in the cold.

. . . . . .

[fol. 594] Redirect examination.

. . . . . .

[fol. 595] Q. Al- right——

A. —they had the idea that the bill of lading took preference over the waybill, that is, if a broker's name was not shown on the waybill and was shown on the bill of lading, that the bill of lading took preference over the waybill; now, the waybill is made out from the original shipper's bill of lading, the shipping instructions, and the waybill is supposed to contain all of the information that the shipper has given when he turns the shipment over to the carrier and for that reason the waybill takes preference over any other bill of lading and it was disclosed at that meeting, both by Mr. Gilles and Mr. Plow, who were both there, and by the C. P. R. general superintendent of transportation, that they had been noting around the country too many fictitious bills of lading that were being used for custom purposes——

Q. Was that said in their presence?

A. Absolutely; and they decided the practice should be [fols. 596-601] stopped.

. . . . . .

[fol. 602-608] ANNIE KRAMER, called as a witness in behalf of the plaintiff, was duly sworn on oath and testified as follows:

Direct examination.

Mr. Eriksson:

Q. Your name is Annie Kramer?
A. Yes.
Q. And you have your home and live at Portal, North Dakota?
A. Yes.
Q. And you are a widow?
A. Yes.
Q. And your husband's name was Harry J. Kramer, was it?
A. Yes.
Q. He died in 1937, was it?
A. October 14, 1936.
Q. October 14, 1936?
A. Yes.
Q. Prior to his death he and Mr. Kramer had run the plaintiff's business?
A. Yes.

. . . . . .

[fol. 609] Q. Mrs. Kramer, I'm going to ask you a few questions on subjects that have already been covered but will try to ask you about things that haven't been cleared up before—you remember that the C. P. R. changed the [fols. 610-624] routing of shipments to Noyes away from Portal, you remember that?
A. Yes.
Q. When did you first hear about that proposed change?
A. On June 22, 1940.
Q. And how did you come to hear about that?
A. Mr. Jensen came and took me over to the train and he mentioned something about that it was rumors that the C. P. R. was going to transfer all their shipments through Noyes but he didn't think it would amount to anything.
Q. What if anything did you say?
A. Well, I told him I was going away and if anything came up that he should let me know and I gave him my

address or get in touch with Harry or Johnny—he was right there—if anything turned up that I should know about.

Q. And you went away then on the 22nd?

A. Yes.

Q. And when did you return?

A. I think it was around the 16th of July.

Q. And in the meantime had you heard anything from Mr. Jensen?

A. No.

* * * * * * *

[fol. 625] Mr. Eriksson: Alright. That's all, Mrs. Kramer. Plaintiff rests.

MOTION TO DISMISS

Mr. Murphy: Plaintiff having rested the defendants move that this action be dismissed on the following grounds: First, it appears of the record that the plaintiff is a foreign corporation, that is, a corporation of the State of North Dakota and is transacting business in the State of Minnesota and has before the commencement of this action without the certificate of authority as required by the laws of the State of Minnesota and is not entitled to sue in the state of Minnesota; second, on the ground that the evidence wholly fails to prove or sustain any of the allegations contained in the plaintiff's complaint; third, we move to dismiss as to the defendant Rine as there is absolutely no evidence in this case which in any way tends to prove or sustain any [fol. 626] allegations as to him, it appearing from the record that he never at any time had been affiliated with or employed by or connected with the plaintiff company and was under no obligation or duty of any kind with respect to the same. I want to make that motion for the record at this time.

The Court: The motion will be denied.

MOTION FOR LEAVE TO AMEND ANSWER

Mr. Murphy: Before we open I want to ask leave to amend the answer by adding thereto pleading the North Dakota statute and the proposed amendment being to paragraph six of the separate answer of the defendant Jensen. I'll say to the Court that at the time of the argument here on the temporary order the matter was called to counsel's

attention and he stated at that time, as I understand it, that he didn't rely upon the statute. We think the record should be cleared on that. I assume under the Minnesota practice it is a matter within the discretion of the Court to allow an amendment at any time before judgment.

* * * * * * *

[fol. 627] Mr. Murphy: Well, it doesn't change the issues in any way.

The Court: I don't think it will change the issues in any way. I think the issue involved here is whether the defendant has violated his duty as a fiduciary and not whether he has violated a contract. If, as the evidence may indicate, he has violated his duty as a fiduciary he will be held to an accounting regardless of any agreement to refrain from entering a competing business because as a fiduciary it is his duty to devote his efforts toward the good of the principal and the trust which he represents and I don't believe that the North Dakota statute will change that rule of law. I shall permit the amendment. Motion granted.

* * * * * * *

[fols. 628-660] NORMAN G. JENSEN, one of the defendants, called as a witness in behalf of the defendants, was duly sworn on oath and testified as follows:

* * * * * * *

[fol. 661] Cross-examination.

Mr. Eriksson:

Q. You just testified in response to Mr. Murphy's question, you told the court that you advised Mr. Mackay or stated to Mr. Mackay, on the evening of June 29, 1940, that you had not come to do business in the name of or for the Union Brokerage Company but had come as an individual?

A. That's right.

Q. If that is true will you please explain to the court why you left an order, exhibit Q, with Mr. MacKenzie directing him to transfer to you the Union Brokerage Company shipments?

A. I wanted to get those bills of lading so that we could take them back to the C. P. R. to ascertain which of the

brokers transacting business at Noyes was intended to clear the shipments.

[fols. 662-670] (Plaintiff's Exhibit KKK marked for identification.)

Q. Is it not true that before June 29, 1940, and ever since that time, that the regulation of the customs service has been and is that the consignee, the broker consignee named by the carrier on the bill of lading is the one who has the sole right to enter merchandise and that this authority cannot be delegated to anyone else?

A. I don't understand your—it cannot be delegated without the authority of the shipper.

Q. I'll show you Plaintiff's Exhibit KKK and ask you to read that and then tell the court if that isn't a correct statement of the rule that has been in force since before June 29, 1940?

A. The statement is no doubt correct.

Mr. Eriksson: We offer exhibit KKK.

Mr. Murphy: No objection.

The Court: It may be received.

Mr. Eriksson:

. . . . . .

[fols. 671-690] Q. Now, another question I'd like to ask you before we proceed with the remainder of the direct examination: it is true, is it not, that on June 29, 1940, or before, you had made up your mind to follow the business diverted from Portal to Noyes and to operate the business in your own name at Noyes, isn't that right?

A. I had made up my mind to open up business in my own name at Noyes.

Q. But you chose not to resign at that time?

A. Well, in all events, I did not resign at that time.

Q. And another thing I'd like to have you clear up for us, you will concede, will you not, that there can't be two original bills of lading out at the same time regarding one shipment?

A. There can't be two original bills of lading out at the same time. That is correct.

. . . . . .

[fol. 691] COLLOQUY

(Attorneys confer with the court.)

Mr. Eriksson: Your Honor, I won't question Mr. Murphy's nor Mr. Palda's statement as to what the North Dakota law is. They undoubtedly know it and their word is as good as anybody elses and so, subject to the objection that we have already made that it is inadmissible under the pleadings as they were and that the amendment is not seasonably made and it is immaterial and irrelevant to any issue in this case, I am certainly willing and I think associate counsel is willing to agree that whatever Mr. Murphy [fol. 692] says the North Dakota law is is the law in North Dakota on that subject.

Mr. Murphy: Well, may we stipulate then that at the time the contract or memorandum, Exhibit C, was entered into, and at this time, the laws of the State of North Dakota provided as follows: "Section 5928, Compiled Laws of the State of North Dakota for the year 1913: In restraint of business void. Every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind, otherwise than as provided by the next two sections, is to that extent void. Section 5929, Compiled laws of the State of North Dakota for the year 1913: Goodwill excepted. One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified count', city, or a part thereof, so long as the buyer or any person deriving title to the good will from him carries on a like business therein. Section 5930, Compiled Laws of the State of North Dakota for the year 1913: Partners excepted. Partners may upon or in anticipation of a dissolution of the partnership agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof."

Mr. Eriksson: Is that all, Mr. Murphy?

Mr. Murphy: Yes.

Mr. Eriksson: We agree on the assurance of Mr. Mur- [fol. 693] phy that that is a statutory law of the State of North Dakota but we make that agreement subject to the exception and the objection that we first noted.

The Court: Your objection isn't to the fact that that is

the law but to the action on the part of the Court in permitting the answer to be amended?

Mr. Eriksson: Yes.

The Court: It may be so understood.

Mr. Murphy: We rest.

(Afternoon recess.)

Mr. Eriksson: May it please the court, the plaintiff rests and I understand that Mr. Palda and Mr. James Eriksson have had some conferences about a subject that they had better present——

Mr. Murphy: Before you do that, plaintiff having rested, I want to renew the motion made at the close of plaintiff's case.

The Court: Motion denied.

(Attorneys confer with the court.)

. . . . . .

[fol. 694] In District Court of Kittson County

Stipulation Settling Case

It is hereby stipulated and agreed that the foregoing proposed case consisting of 522 pages of typewritten matter and 92 exhibits, together with the depositions of Ted Solheim, J. S. Westlake and Chas. L. Hawley, taken at Minot, North Dakota, before Anna Jones, a notary public in and for the county of Ward, state of North Dakota, on December 5, 1941, and the deposition of H. M. Westrum taken at Bowbells, North Dakota, before Earl Walter, a notary public in and for the county of Burke, state of North Dakota, on November 12, 1941, and finally concluded on December 2, 1941, is a true, complete and accurate report of the testimony of each and all of the witnesses who were sworn and testified at the trial of said cause, and all the evidence received and rejected by the court, and all rulings of the court upon the admission and rejection of evidence and of all rulings and directions of the court of whatever nature and all exceptions taken and entered to any and all [fol. 695] of the rulings of the court and is a true, complete and accurate report of all proceedings, actions and things of whatever nature had and done on the trial of said cause,

and that the same may be settled and allowed by the court as the settled case herein.

Dated June 30, 1942.

Francis Murphy, Palda & Palda, A. D. Bornemann, Attorneys for Defendants. Leonard Eriksson, For Himself and Associates, Attorneys for Plaintiff.

IN DISTRICT COURT OF KITTSON COUNTY

ORDER SETTLING CASE

Pursuant to a stipulation existing between the parties hereto,

I hereby certify that the within and foregoing case, consisting of 522 pages of typewritten matter and 92 exhibits, together with the depositions of Ted Solheim, J. S. Westlake and Chas. L. Hawley, taken at Minot, North Dakota, before Anna Jones, a notary public in and for the county of Ward, state of North Dakota, on December 5, 1941, and the deposition of H. M. Westrum taken at Bowbells, North Dakota, before Earl Walter, a notary public in and for the county of Burke, state of North Dakota, on November 12, [fol. 696] 1941, and finally concluded on December 2, 1941, has been examined by me and found conformable to the truth and to contain all of the testimony and evidence offered or introduced on the trial of this cause and also all objections, rulings, exceptions, orders and all other proceedings of such trial, and I hereby settle and allow the same as the settled case herein.

Dated July 28, 1942.

Oscar R. Knutson, Judge of The District Court.

IN DISTRICT COURT OF KITTSON COUNTY

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

The above entitled action being upon the calendar for the November, 1941, regular term of said court, came on for trial before the undersigned, one of the judges thereof,

without a jury, by consent of the parties, on the 8th day of December, 1941, at the courtroom in the courthouse, in the village of Hallock, in the county of Kittson and state of Minnesota. Leonard Eriksson, Esq., and James S. Eriksson, Esq., of Fergus Falls, Minnesota, appeared as attorneys for the plaintiff, and Francis Murphy, Esq., of Fargo, North Dakota; Robert W. Palda, Esq., of Minot, North Dakota, and A. D. Bornemann, Esq., of Hallock, Minnesota, appeared for and in behalf of the defendants.

[fol. 697] The court having heard and considered the evidence adduced by and in behalf of the respective parties, having heard the arguments of counsel and read and considered the written briefs submitted in behalf of the respective parties involved, and being fully advised in the premises, makes the following findings of fact

1

That the plaintiff was during all the times herein mentioned and now is, a corporation duly organized, created and existing under and by virtue of the laws of the state of North Dakota having its principal office and place of business at Portal, in the county of Burke and state of North Dakota.

2

That plaintiff has been during all the times herein stated, and now is, engaged in the business of a customhouse broker.

3

That under the Tariff Act of 1930 of the United States, Section 641 as amended (USAC Title 19, Section 1641) the secretary of the treasury of the United States is authorized to license citizens of the United States of good moral character, and corporations, associations and partnerships as customhouse brokers, and to prescribe rules and regulations governing the licensing thereof; that a corporation so licensed is required by said act to have at least two of its officers individually licensed before the cor-

[fol. 698] poration may receive a license to so operate.

4

That pursuant to said act of congress the secretary of the treasury has promulgated rules and regulations governing

the licensing of customhouse brokers. (Plaintiff's Exhibit A.)

5

That the principal function of customhouse brokers, as far as herein concerned, is that of making entry of shipments of goods entering the United States from the Dominion of Canada, paying the customs duty imposed on such shipments, and clearing the same so that they may continue on their course to their ultimate destination with the least possible loss of time; that in making entry shipments are consigned on bills of lading by the shipper to the customhouse broker chosen by such shipper; that a copy of such bill of lading is thereafter delivered to the broker by the carrier or mailed directly to him by the shipper; that upon receipt of such bill of lading by the broker the same is presented to the collector of customs and thereupon the duty due the United States is determined by the collector of customs and paid by the broker, whereupon the shipment is cleared and permitted to proceed to its ultimate destination and consignee; that the customhouse broker, so acting, is considered, for the purpose of making such entry, [fol. 699] the actual consignee and acts as the agent of the shipper in making such entry; that in clearing said shipments he aids in the collection of customs duties and facilitates the free flow of commerce between a foreign country and the United States; that the customhouse brokers, involved herein, are established as federal instrumentalities and are engaged in interstate commerce in facilitating the free flow of commerce between the Union States and the Dominion of Canada.

6

That as compensation for their services customhouse brokers are paid a fee by the shipper or the ultimate consignee, the amount of which is determined by an agreement between them; that they receive no compensation of any kind whatsoever from the United States.

7

That the president of the United States, by act of congress is authorized to establish customs collection districts and to re-arrange the same as the exigencies of the service may require; that District Number 34, known as the Dis-

trict of Dakota, includes all of the states of North Dakota and South Dakota and the county of Kittson, in the state of Minnesota, lying north of 46th degree of north latitude. (Vol. 6-A, FCA, Title 19, Section 2.)

8

[fol. 700] That Portal, North Dakota, Noyes, Minnesota and Northgate, North Dakota are all designated as ports of entry in District Number 34.

9

That licenses are issued to customhouse brokers for one customs collection district only and may be used to clear shipments at any port of entry within the district for which so issued.

10

That plaintiff was, during all the times herein mentioned, and now is, a duly licensed customhouse broker for District Number 34, and had for many years prior to September 8, 1938, conducted a customhouse brokerage business at Portal, in the state of North Dakota, and has continued to conduct the same after said date, there and elsewhere, as hereinafter stated.

11

That prior to February 15, 1937, one Carl M. Anderson and one H. J. Kramer were the principal stockholders of plaintiff corporation and the persons in actual control of its affairs; that said H. J. Kramer died October 14, 1936, and that his widow, Annie Kramer, succeeded to ownership of his stock in said corporation; that said Carl M. Anderson died on February 17, 1937, and his widow, Nan W. Anderson, succeeded to his stock in said corporation; that Harry O. Kramer, a son of said H. J. Kramer and [fol. 701] Annie Kramer, was then, and continued to be, the owner of a qualifying share of stock in said corporation and acted as its secretary substantially all the time herein mentioned.

12

That upon the death of said H. J. Kramer, one Minton V. Carlson was permitted to purchase stock in said corporation and became a director and officer thereof; that

after the death of said Carl M. Anderson said Minton V. Carlson and Harry O. Kramer continued to operate said business until the 8th day of September, 1938.

13

That prior to 1937 the defendant, Norman G. Jensen, was superintendent of schools at Ross, North Dakota; that he had no experience as a customhouse broker; that in the month of March, 1937, said defendant was licensed as a customhouse broker for District Number 34, and shortly thereafter moved to Portal, North Dakota, where he established a customhouse brokerage business in competition with plaintiff; that he also established and conducted a small customhouse brokerage business at the port of entry of Northgate, North Dakota, which is in District Number 34, and carried on a limited insurance and finance business, which was in no way related to the customhouse brokerage business.

[fol. 702] 14

That on the 8th day of September, 1938, said defendant had acquired approximately fifty regular customers for whom he was acting as customhouse broker at Portal, North Dakota; that on that date plaintiff had approximately one hundred fifty regular customers that it was serving as customhouse broker at Portal, North Dakota; that on said date plaintiff and said defendant, Norman G. Jensen, entered into an agreement under the terms of which said defendant transferred all his brokerage business at Portal, North Dakota, to plaintiff, in consideration for which he received twenty-five shares of stock in plaintiff corporation, fully paid, having a par value of twenty-five hundred dollars, became its president and treasurer and was placed in complete charge of its affairs; that the terms of said agreement were embodied in a written instrument (Plaintiff's Exhibit C), which was signed and delivered by said defendant to plaintiff and which agreement reads as follows:

> "I, Norman Gilbert Jensen, in consideration of receiving twenty five (25) shares of the capital stock of the Union Brokerage Corporation of Portal, North Dakota, do hereby agree to turn over to the Union Brokerage Corporation all my right, title and interest in the

custom brokerage business now conducted by me or under my name. I do hereby agree that all brokerage [fol. 703] business in the future will be conducted under the name of and for the sole benefit of the Union Brokerage Company, a corporation of North Dakota, that I will not at any time engage privately or otherwise in any business that would compete with the general business and purpose of the Union Brokerage Company; I do hereby further agree not to hold or acquire any interest whatsoever, stock or otherwise in any other Broker or Brokerage company, which would compete with the Union Brokerage Company.

I do further agree to use my very best efforts to conduct the Union Brokerage Business for the benefit of the Corporation, its officers, directors and stockholders; to give the daily conduct of its business my full time, best efforts and energy, and to operate and conduct said business in full compliance with the minutes and by-laws of the Union Brokerage Company.

It is understood that in consideration of the above stock being issued to me and my wife as joint tenants, said stock is all fully paid. I will further give the officers and directors my full cooperation at all times, and will conduct said business with the full faith herein placed in me and will not at any time violate or take advantage of the fiduciary relationship which I now oc- [fol. 704] cupy by reason of my office in said Corporation.

Witnessed this 6th day of September, 1938.

M. V. Carlson — Norman G. Jensen

H. O. Kramer — "

that at the time of entering into said agreement it was agreed and understood by and between said defendant and the other stockholders of plaintiff that said defendant was to be permitted to continue his brokerage business at Northgate, North Dakota, as his own individual business; that the statutes of the state of North Dakota provide:

"Section 5928, Compiled Laws of the State of North Dakota for the year 1913:

In Restraint Of Business Void. Every contract by which any one is restrained from exercising a lawful

profession, trade, or business of any kind, otherwise than as provided by the next two sections, is to that extent void.

Section 5929, Compiled Laws of the State of North Dakota for the year 1913:

Good Will Excepted. One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part thereof, so long as the buyer or any person deriving title to the good will from him carries on a like business therein.

Partners Excepted: Partners may upon or in anticipation of a dissolution of the partnership agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof."

15

That at the same meeting held on September 8, 1938, Minton V. Carlson resigned as a director and officer of said corporation, surrendered all his stock therein and for all practical purposes completely served his connection with said corporation; that thenceforth the stockholders of said corporation were, and now are, Norman G. Jensen, as the owner of 25 shares of stock; Nan W. Anderson, as the owner of 37½ shares of stock, and Annie Kramer, as the owner of 37½ shares of stock; that Harry O. Kramer appears to have been the nominal owner of a share of stock in said corporation for the purpose of qualifying him to act as a director and officer thereof.

16

That the capital stock of plaintiff was carried on its books at a par value of ten thousand ($10,000.00) dollars; that of this amount the good will of the company constituted the greatest asset, and was carried on its books as of September [fol. 706] 30, 1938, at the sum of eight thousand one hundred thirty-seven and 52/100 dollars ($8,137.52), and continued to be carried on its books at a sum approximating eight to nine thousand dollars; that the good will of said company constituted almost entirely of the contacts it had made with shippers in Canada, and elsewhere, and the

business it had done for such customers as a customhouse broker over a period of years.

17

That the position of the defendant, Norman G. Jensen, as an officer and the manager of plaintiff, placed him in intimate contact with the customers of plaintiff and made available to him all the records of plaintiff, including the names and location of the customers for whom plaintiff had acted as customhouse broker, and the nature of the business done by each of these customers.

18

That up until the middle of the year 1940 plaintiff had enjoyed a very lucrative business at Portal, North Dakota; that the net profits for the year 1939 amounted to the sum of seven thousand two hundred ninety-seven and 83/100 dollars ($7,297.83), which, after putting aside a small amount for working reserve, was divided among the stockholders in the same proportion as they held stock in said corporation; that in addition to his share of the net profits of the company the defendant Jensen received a salary of [fol. 707] two hundred fifty ($250.00) dollars per month for his services in managing and operating said company, which salary continued until the latter part of 1940 when, for a brief period of time, he agreed to accept one hundred twenty-five ($125.00) dollars per month as his salary on account of the decrease in the income of plaintiff corporation.

19

That neither Nan W. Anderson or Annie Kramer had any personal knowledge of the customhouse brokerage business and both of them were incapable of operating the same; that after the defendant Jensen became a stockholder, and the active manager of said company, said Nan W. Anderson and Annie Kramer placed their complete confidence and trust in his management of the affairs of the company and completely relied upon his integrity in carrying on its affairs for the mutual benefit of himself and the other stockholders thereof.

20

That only one railway line enters the port of Portal, North Dakota, namely the Canadian Pacific Railway (here-

after referred to as the C. P. R.) which connects with the Minneapolis, St. Paul and Soo Ste. Marie Railway (hereafter referred to as the Soo Line) at the border.

21

[fol. 708] That the Canadian Pacific Railway Company controlled the routing of shipments in the Dominion of Canada; that during the early part of 1938 said C. P. R. decided to re-route all shipments then going through Portal, North Dakota, to Noyes, Minnesota, in order that the C. P. R. might receive a greater share of the revenue from freight by hauling it a longer distance over its lines before entering the United States; that the Soo Line, as well as the lines of the Great Northern Railway Company connect with the C. P. R. at Noyes; that such re-routing affected all shipments going through Portal, North Dakota, excepting only those consigned to points in North Dakota and South Dakota; that said re-routing affected 90 to 95 percent of the business done by plaintiff at Portal, North Dakota.

22

That the defendant Jensen was informed of such proposed re-routing on or about June 20, 1940, while acting as president and treasurer of plaintiff and its manager; that plaintiff could follow said business to Noyes and its license was operative thereat; that said defendant, well knowing that the other stockholders of plaintiff company placed full reliance and confidence in him, failed and neglected to inform them of such proposed re-routing and instead of so doing secretly planned to follow said business [fol. 709] to Noyes, Minnesota, and obtain the same for his own personal use and benefit; that in order to carry out said purpose he engaged the services of the defendant, Curtis M. Rime, who was then teaching school in Portal, North Dakota; that said Rime had no experience in the customhouse brokerage business; that in order to qualify him to carry on said business the defendant Jensen took him into plaintiff's office at Portal, North Dakota, and there trained him in the work and duties of such customhouse broker.

23

That the re-routing of said business became effective on July 1, 1940; that on said date the defendant Jensen, while

acting as the managing officer of plaintiff, established a customhouse brokerage business at Noyes, Minnesota, in his own name, executed a power of attorney to the defendant Rime and placed him in charge of said business, while he, the defendant Jensen, continued in charge of the business at Portal; that none of said facts or the information he had acquired were conveyed to the other stockholders of plaintiff.

24

That after the re-routing of said business many of the shippers with whom plaintiff had formerly done business at Portal continued to consign their shipments to plaintiff at Noyes, Minnesota; that said shipments could not be cleared [fol. 710] at Noyes, Minnesota, by the defendant Jensen in his own name without causing a change to be made in the bill of lading; that in order to enable him to appropriate said business to his own use, the defendant Jensen had procured a rubber stamp containing thereon his own name, which he left at the depot at Emerson, Manitoba, which is the port of exit of shipments entering the United States at the port of Noyes; that the defendant Jensen then prepared and left with the agent in charge of the depot at Noyes, Minnesota, instructions, in writing, reading as follows:

"Mr. MacKenzie June 29, 1940
Noyes, Minn.

SIR:

Kindly deliver to Mr. Curtis Rime all bills of lading and invoices for shipments to be cleared through customs by Norman G. Jensen or Union Brokerage Co.

Sincerely
Norman G. Jensen"

that pursuant to said instructions, and acting upon the belief that the defendant Jensen was acting for plaintiff as its officer, bills of lading consigned to plaintiff were delivered to the defendant Rime; that he thereupon took said bills of lading to the depot at Emerson, Manitoba, stamped the name of Norman G. Jensen over the name of plaintiff and altered the same so as to show Jensen's name as broker [fol. 711] consignee and thereafter cleared said shipments in Jensen's name at Noyes, Minnesota.

25

That the other stockholders of plaintiff, excluding the defendant Jensen, first learned that said business had been re-routed to Noyes, and first learned that Jensen had followed said business to Noyes, during the month of July, 1940; that when the defendant Jensen was confronted with said facts by the attorney for plaintiff and the other stockholders thereof, he stated and represented to them that said business at Noyes was unprofitable and that it barely paid the expenses of said office and would in all probability be discontinued and further stated and represented to them that plaintiff could not operate at Noyes, Minnesota, for the reason that it had formerly entered into an agreement, in writing, with one William F. Mackay, a customhouse broker then operating at Noyes, Minnesota, providing that plaintiff would not establish a customhouse brokerage business at Noyes and that in consideration thereof said Mackay would refrain from entering into a competing business at Portal, and further represented that he, said defendant Jensen, had read or seen such statement in writing; that said statements and representations so made by the defendant Jensen were false, and said defendant well knew [fol. 712] that the same were false, and that the said statements and representations were falsely and fraudulently made for the purpose of enabling said defendant Jensen to appropriate to his own use the business of plaintiff coming to the port at Noyes, Minnesota, and for the purpose of inducing plaintiff to believe that it could not operate at Noyes, Minnesota.

26

That plaintiff learned that said statements, so made by the defendant Jensen, were false, during the month of September, 1940; that thereupon the defendant Jensen was asked to resign from plaintiff company as an officer and the manager thereof and a demand was made upon him for a complete accounting of the business; that on the 7th day of November, 1940, defendant did resign his position as an officer and director of plaintiff; that up until that time he had continued to receive his salary as such officer and director of plaintiff company; that on the date of his resignation all the cash assets of plaintiff, including the working reserve of the company, had been exhausted in the payment of said defendant's salary and other operating expenses of said business at Portal, North Dakota.

27

That after learning of the re-routing of said business the stockholders of plaintiff sent the defendant Jensen to the [fol. 713] west coast, and elsewhere, to contact shippers for whom plaintiff had acted as broker in an effort to procure their assistance in having the business returned to Portal, North Dakota; that said defendant did make trips to various points in western Canada, and elsewhere, and did contact some shippers but without any success.

28

That in determining the custom duty to be paid on a shipment of goods, the duty imposed is frequently in excess of, or less than, the actual duty due; that in such cases the customhouse broker, as part of the services rendered by him, seeks to recover the excess from the United States government for his customers, and is liable, on the other hand, for any deficiency; that in order to complete said business it is necessary, and customhouse brokers are required by law, to keep complete and adequate records; that at the time of his resignation, on November 7, 1940, the defendant Jensen informed the other stockholders of plaintiff that most of the files, correspondence, and records of plaintiff had been lost; that said records were kept in the office of plaintiff at Portal, North Dakota, and were in the care and custody of said defendant; that no information concerning the loss of said records had been conveyed to any of the stockholders of plaintiff prior to the time of the meeting thereof in Portal on November 7, 1940.

[fol. 714]

29

That after his resignation as an officer of plaintiff the defendant Jensen has continued to operate said business at Noyes, Minnesota; that a large part of the business so received by him is business done for customers for whom plaintiff had acted as broker prior to the establishment of said business at Noyes; that said defendant has informed many of such customers that plaintiff was not operating at Noyes and was, and has been, able by his wrongful and fraudulent conduct, and his position as an officer of plaintiff, to acquire in his own name the business which was and is rightfully and in equity and good conscience, that of the plaintiff.

That between the 1st day of July, 1940, and the 1st day of December, 1941, said business so conducted at Noyes, Minnesota, has earned the following amounts:

1940		
July	$ 944.67	
August	1,377.75	
September	756.80	
October	1,235.60	
November	1,619.75	
December	929.05	
1941		
January	$ 895.00	
February	598.25	
March	587.25	
[fol. 715] April	556.50	
May	968.50	
June	1,141.50	
July	1,421.25	
August	1,529.50	
September	1,102.00	
October	2,213.30	
November	1,662.20	
Total		$19,538.87

That the deductible expenses for said period of time are:

Salaries		
Curtis M. Rime	$2,480.00	
Carlson	898.21	
McIlraith	302.00	
Rustad	338.60	
H. R. Jensen	197.50	
V. Jensen	60.00	
Wegener	358.90	
Social Security	46.35	
Check exchange and post office supplies	839.98	
Telephone & Telegraph	398.26	
Misc. expense	1,936.13	
Travel	1,951.50	
Rent and Light	113.00	
Total Deductible Expense		$9,920.43
Net Profit		$9,618.44

[fol. 716] 31

That in addition to the salaries paid to the defendant, Curtis M. Rime, he has been paid various sums of money from time to time designated as a bonus; that said payments were in the nature of dividends paid out of the earnings of the business; that the sum of one hundred fifty ($150.00) dollars per month paid said defendant as a salary, was a fair and adequate compensation for the services rendered by him and that the additional amounts paid, totaling the sum of one thousand eight hundred seventy-one and 66/100 ($1,871.66) dollars, should be returned to plaintiff; that said defendant Rime knew that said business, in truth and in fact, belonged to plaintiff and that he wrongfully aided and abetted the defendant Jensen in appropriating the same to his own use.

32

That subsequent to the resignation of the defendant Jensen plaintiff has commenced to do business at Noyes, Minnesota, which business is handled for plaintiff by William F. Mackay, acting under a power of attorney, and by others acting in a similar capacity.

33

That the defendant Jensen, while establishing said business at Noyes, was acting in a fiduciary capacity for plaintiff; that he owed it a duty of disclosing the information acquired while so acting, affecting, or about to seriously [fol. 717] affect, its business; that he wrongfully converted said business to his own use; that said business and the income and profits thereof in equity and good conscience belonged to plaintiff and that the defendants held and operated the same in trust for the plaintiff during the times herein stated.

34

That all rebates, commissions, fees and other income earned or to be earned or paid, out of said business up to November 30, 1941, belong to plaintiff and are held for plaintiff's use and benefit in trust by the defendants.

35

As to plaintiff's second cause of action I find that there is no evidence to sustain the same.

Conclusions of Law

As conclusions of law from the foregoing findings of fact, it is adjudged, ordered and decreed:

1

That plaintiff have and recover of the defendant, Norman G. Jensen, the sum of nine thousand six hundred eighteen and 44/100 ($9,618.44) dollars, with interest thereon from November 30, 1941, at the rate of six (6%) percent per annum.

2

That plaintiff have and recover of the defendant, Curtis M. Rime, the sum of one thousaid eight hundred seventy-five and 66/100 ($1,871.66) dollars, with interest thereon at [fol. 718] the rate of six (6%) percent per annum from and after the 30th day of November, 1941; that any amount paid on the judgment so entered against the defendant, Curtis M. Rime, shall be credited upon the judgment so entered against the defendant, Norman G. Jensen.

3

That the defendants, and each and both thereof, surrender and deliver to plaintiff, or its authorized agent or officer, all books of account, correspondence, claims for rebate, and other records and files pertaining to the business conducted at Noyes, Minnesota, from the beginning thereof on July 1, 1940, to and including the 30th day of November, 1941, and that they, and each and both thereof, assign to plaintiff all claims for rebates, commissions, fees or other income due or to become due, on account of business so conducted prior to and including the 30th day of November, 1941, upon the assumption of liability on the part of plaintiff for any amount that is due or may become due for under payments or money due or to become due the United States government on account of said business.

4

That plaintiff's second cause of action be dismissed.

Let judgment be entered accordingly.

Dated March 27, 1942.

Oscar R. Knutson, Judge of the District Court.

[fol. 719] It is ordered that a stay of thirty (30) days from the date of the filing hereof be granted.

Oscar R. Knutson, Judge of the District Court.

MEMORANDUM

That the defendant Jensen acted as a fiduciary and occupied a position of trust and confidence can hardly be open to doubt. That he did not act in good faith in establishing the business at Noyes in his own name is equally clear. It is also clear that the business he did at Noyes was substantially all with plaintiff's customers.

The convenient loss (or destruction) of plaintiff's books and records at the time the defendant resigned his position has made it increasingly difficult for plaintiff to establish the facts but the evidence showing a breach of trust is hardly open to dispute. Fair play and good faith would have required at least a disclosure of the facts, about to so vitally affect the very existence of plaintiff, to the other stockholders in order that they might take adequate measures to follow the business of plaintiff to Noyes if they saw fit. That the business followed plaintiff is evident from the fact that it became necessary for the defendants to alter the bills of lading which came consigned to plaintiff before they could clear the shipments covered by such bills of lading. All plaintiff had to do to continue its busi- [fol. 720] ness was to put someone in charge of it at Noyes to handle it as it came.

It seems clear to me that plaintiff is entitled to the earnings of the business at Noyes up until the time that Jensen resigned as an officer of plaintiff. Whether plaintiff is entitled to the profits of the business after that time is more difficult to determine. However, it is clear that he continued to convert plaintiff's business to his own use by wrongfully altering bills of lading consigned to plaintiff long after he resigned as an officer of the company. It seems to me that the only equitable disposition of the matter is to require the defendant Jensen to account for all the profits of the business shown by the evidence to have been earned. He is still the owner of 25% of the stock of plaintiff corporation. Whether the actions of the other stockholders since his resignation, in his absence, are legal or not is not involved in this action.

Defendants contend that Plaintiff's Exhibit C is void under the laws of the state of North Dakota. Whether the agreement could be specifically enforced or not need not be determined. Even if it is void under the laws of the state of North Dakota, if specific performance were sought, it does not alter the ordinary rules of equity requiring a fiduciary to act toward his principal in good faith. The agreement, whether valid or not, does furnish some evidence of the fact that defendant, while drawing his salary, owed his full time and ability to plaintiff. That he has [fol. 721] violated that duty, as well as others, is patent from the evidence.

In passing it might be said that if the demands of plaintiff's then attorney and the other stockholders had not been so unreasonable when the activities of the defendants, of which they now complain, were discovered, this litigation might have been avoided. No good reason has been suggested why Jensen should then have been, or now be, deprived of his stock in plaintiff company, in addition to accounting for the profits of this business. His stock was fully paid for. He turned in his own business as part payment. He should be permitted to retain his stock.

(Filed March 28, 1942, C. A. Erickson, clerk, District Court, Kittson County, Minn.)

In District Court of Kittson County

Judgment and Decree—Filed August 20, 1942

The above entitled action having been on the calendar of causes for trial, at the November, 1941, regular term of the above named court, came on for trial by the court without a jury on the 8th day of December, 1941, at the court room in the courthouse in the village of Hallock, Kittson County, Minnesota, the Hon. Oscar R. Knutson, district judge, presiding.

Leonard Eriksson, Esq., and James S. Eriksson, Esq., of Fergus Falls, Minnesota, appeared as attorneys for the [fol. 722] plaintiff and Francis Murphy, Esq., of Fargo, North Dakota, and Robert W. Palda, Esq., of Minot, North Dakota, and A. D. Bornemann, Esq., of Hallock, Minnesota, appeared for and on behalf of the defendants.

After having heard and considered the evidence adduced by and in behalf of the respective parties, and after having heard and considered the arguments of counsel, oral and written, and being fully advised in the premises, the court made and filed its findings of fact, conclusions of law and order for judgment.

Now, pursuant to said order for judgment, and on motion of Leonard Eriksson, attorney for the plaintiff,

It is ordered, adjudged and decreed, that plaintiff have and recover of the defendant Norman G. Jensen the sum of nine thousand six hundred eighteen and 44/100 ($9,618.44) dollars with interest thereon from November 30, 1941, at the rate of six (6%) percent per annum, amounting to the sum of four hundred sixteen and 78/100 ($416.78) dollars and costs and disbursements taxed and allowed herein amounting to the sum of $289.58, making a total amount of $10,324.80.

It is further ordered, adjudged and decreed, that the plaintiff have and recover of the defendant, Curtis M. Rime, the sum of one thousand eight hundred seventy-one and 66/100 ($1,871.66) dollars with interest thereon at the rate [fol. 723] of six (6) percent per annum from and after the 30th day of November, 1941, amounting to the sum of eighty-one and 12/100 ($81.12) dollars and costs and disbursements taxed and allowed herein amounting to the sum of $289.58, making a total amount of $2,242.36; that any amount paid on the judgment so entered against the defendant, Curtis M. Rime, shall be credited upon the judgment so entered against the defendant Norman G. Jensen.

It is further ordered, adjudged and decreed, that the defendants, and each and both thereof, surrender and deliver to plaintiff, or its authorized agent or officer, all books of account correspondence, claims for rebate, and other records and files pertaining to the business conducted at Noyes, Minnesota, from the beginning thereof on July 1, 1940, to and including the 30th day of November, 1941, and that they, and each and both thereof, assign to plaintiff all claims for rebates, commissions, fees or other income due or to become due, on account of business so conducted prior to and including the 30th day of November, 1941, upon the assumption of liability on the part of the plaintiff for any amount that is due or may become due for underpayments or money due or to become due the United States government on account of said business.

[fol. 724] It is further ordered, adjudged and decreed, that plaintiff's second cause of action be dismissed.

Dated August 20, 1942.

By the Court, C. A. Erickson, Clerk of the District Court.

[File endorsement omitted.]

In District Court of Kittson County

Notice of Appeal to Supreme Court—Filed August 21, 1942

To Leonard Eriksson, Esq., and James S. Eriksson, Esq., attorneys for the above named plaintiff, and to C. A. Erikson, clerk of said District Court:

Please take notice, that the above named Norman G. Jensen and Curtis M. Rime, defendants, appeal to the Supreme Court of the state of Minnesota, from the judgment and the whole thereof, of the said District Court entered herein, on the 20th day of August, 1942.

Dated this 20th day of August, 1942.

Francis Murphy, Fargo, North Dakota; Robert W. Palda, Minot, North Dakota; A. D. Bornemann, Hallock, Minnesota, Attorneys for Defendants.

[fols. 725-726] Due and personal service of the within and attached notice of appeal is hereby admitted at Hallock, Minnesota, this 21st day of August, 1942.

C. A. Erickson, Clerk of the District Court.

[File endorsement omitted.]

(Bond on appeal duly served and filed on August 21st, 1942.)

[fol. 727] Endorsed: Filed May 14, 1943. Grace Kaercher Davis, Clerk Minnesota Supreme Court

No. 103

Kittson County

Youngdahl, J.

33388

UNION BROKERAGE CO., Respondent,

v.

NORMAN G. JENSEN, et al., Appellants

SYLLABUS

Activities of foreign corporation as a customhouse broker, which were local and intrastate in character and had no substantial relation to interstate commerce, *held*, under facts summarized in opinion, to render corporation amenable to Minn. St. 1941, § 303.20 (Mason St. 1940 Supp. § 7495-20), requiring a certificate of authority before bringing an action in the courts of Minnesota.

Reversed.

OPINION

YOUNGDAHL, Justice.

Plaintiff, a North Dakota corporation, brought this action to recover from defendants certain profits resulting from their operation of a customhouse brokerage business at the port of Noyes, Minnesota. The action was tried to the court, and defendants appeal from an adverse judgment for $12,567.16 entered pursuant to findings and order for judgment.

On September 6, 1938, and for some time prior thereto, plaintiff and defendant Jensen, both duly licensed customhouse brokers, conducted their separate brokerage busi- [fol. 728] nesses at the port of Portal, North Dakota. On that date a written agreement was entered into between them which provided, among other things, that Jensen, in consideration of receiving 25 shares of the capital stock of plaintiff at a par value of $100 per share, would turn over to plaintiff his personal brokerage business at Portal and

thereafter refrain from engaging in any competing brokerage business, and that he would generally devote his time, effort, and ability to the best interests of plaintiff, with due regard for his fiduciary relationship thereto. Jensen was elected president and treasurer of plaintiff at a salary of $250 per month. Because of his knowledge of the technical rules and regulations governing the customhouse brokerage business and his practical experience therewith, Jensen assumed management and control of plaintiff. His close, personal supervision of this business is further indicated by the fact that the remaining shares of the capital stock in plaintiff, with the exception of one share nominally held by Harry O. Kramer to qualify him as a member of the board of directors, were held by Mrs. Annie Kramer and Mrs. Nan Anderson, both of whom were unfamiliar with the business and who, through lack of experience and knowledge thereof, were incapable of directing corporate affairs.

Plaintiff and Jensen were each licensed as customhouse brokers pursuant to the provisions of the federal Tariff Act of 1930, § 641, as amended, 19 U. S. C. A. § 1641, and by virtue of these licenses were privileged to conduct the business of customhouse brokers within the confines of a designated geographic area known as District No. 34, comprising the states of North Dakota, South Dakota, and Kittson county, Minnesota, in which latter county is located the [fol. 729] town of Noyes. Section 641(a) of the Tariff Act (19 U. S. C. A., § 1641[a]) provides, in substance, that no license shall be granted to any corporation, association, or partnership unless licenses as customhouse brokers have been issued to at least two members of the partnership or two of the officers of the corporation or association, and such licenses are in force. Jensen's license to act as a customhouse broker became one of the two licenses necessary to carry on plaintiff's business. The other license was issued to Harry O. Kramer, son of stockholder Mrs. Kramer, who during substantially all the time here pertinent acted as secretary of plaintiff.

The major portion of the tonnage passing through the port of Portal, North Dakota, from Canada into the United States, was by rail. The Canadian Pacific Railway (hereinafter referred to as the C. P. R.) had a terminal at Portal, as did the Minneapolis, St. Paul & Sault Ste. Marie Railway (hereinafter referred to as the Soo line), thereby effecting a junction of the two lines at that point over which continu-

ous rail shipments might be made. Shipments of merchandise arriving at a port of entry must be declared as to contents and value, duly inspected by agents of the collector of customs at that port, and the prescribed tariff paid on dutiable items. The customhouse broker, for an agreed compensation, performs this service for the benefit of the shipper or importer of goods. He receives from the carrier the bills of lading covering the shipments and presents these, together with other documents peculiar to the business, to the collector of customs, who estimates the duty to be paid thereon. This sum is advanced by the broker for his client, the shipper. This service, of necessity, involves a working knowledge of the rules and regulations of customs law, as well as sufficient information to enable the [fol. 730] broker to set up and maintain proper books and records in conformity with federal requirements relating to customhouse brokers. In order that a broker may be in a position to render this service to a shipper, it is first necessary that the particular shipment be consigned to a specific broker. A responsibility rests upon the common carrier of goods to deliver them to none other than the consignee named in the bill of lading. Too, unless the proper consignee presents the bill of lading to the customs officers for payment of duty, payment is refused.

About July 1, 1940, the C. P. R. gave notice that thereafter shipments of merchandise from Canada into the United States through the port of Portal, North Dakota, would be rerouted via and cleared at the port of Noyes, Minnesota. By this change, the railroad apparently was able to profit from a longer freight haul across the state of North Dakota. Obviously, unless plaintiff could follow the business to Noyes, it was about to suffer serious loss. Noyes, Minnesota, is located within District No. 34, and the brokerage licenses of plaintiff and Jensen, respectively, covered the entire area. Although the evidence is somewhat conflicting as to plaintiff's knowledge of this contemplated change, it does appear, however, that Jensen, without fully advising the officers and board of directors of plaintiff, opened up an office at Noyes with the aid and assistance of one Rime, his codefendant herein, to whom he gave a power of attorney, and proceeded to conduct the new business as his own solely for personal profit and gain.

Following the rerouting of shipments through the port of Noyes rather than Portal, North Dakota, many of plain-

tiff's Canadian clients continued to consign merchandise to plaintiff for clearance through the port of Noyes and to [fol. 731] designate plaintiff's name specifically as consignee in their bills of lading. Apparently Jensen conceived the idea that he might avail himself of this business on his personal account, provided he could successfully change or have changed the bills of lading so as to designate himself, personally, as broker consignee. He accomplished this by a letter addressed to the chief clerk of the Soo Line at Noyes under date of June 29, 1940, in which he requested the clerk to deliver to his (Jensen's) agent, Rime, all bills of lading and invoices for shipments to be cleared through customs by Jensen or by plaintiff. The employes of the Soo Line at Noyes obviously believed that Jensen was acting on behalf of plaintiff and did not question his authority to make the foregoing request, with the result that bills of lading specifically naming plaintiff as consignee for the purposes of clearance were delivered to Jensen, or to his agent, Rime. These bills of lading were then presented to certain employes of the C. P. R. at Emerson, Manitoba, which is across the border on the Canadian side and the corresponding port of exit, for the proposed alterations to be made in the name of the consignee. These employes were obviously unaware of the true situation, and by the use of a rubber-stamp signature of Jensen they either restamped so as to change the name of the consignee from plaintiff to Jensen or permitted Rime to do so under color of Jensen's authority. The evidence is vague and uncertain as to the actual mechanics of the change, but in any event it was made and Jensen was thereby in a position to present the altered bills of lading, specifically designating himself as customhouse broker, to the collector of customs, pay the duty thereon, and collect the brokerage fee for his services. [fol. 732] When plaintiff became aware of Jensen's operations at Noyes he was pressed for an explanation. This he supplied by advising plaintiff that an agreement had been previously effected between plaintiff and one Mackay, another customhouse broker operating at the port of Noyes, by the terms of which plaintiff had agreed not to seek any business at Noyes in consideration of Mackay's not soliciting business at the port of Portal. Mackay testified on behalf of plaintiff, denied the existence of such an agreement, and vehemently denied informing Jensen that there had been such an agreement. Jensen further informed

plaintiff that the business at Noyes was losing money and that the revenue was scarcely sufficient to pay the office personnel. It seems that plaintiff relied upon this explanation until September 1940. By that time the relationship between plaintiff and Jensen had become strained because of other personal differences not here material. A meeting of the board of directors of plaintiff was called in the office of plaintiff's attorney and Jensen was requested to resign his office, which he did.

Shortly thereafter and in the first part of December 1940, plaintiff opened a customhouse brokerage business at Noyes in competition with Jensen and has continued to operate such business ever since that time. This action for recovery of profits made by Jensen in his operations at Noyes was brought on the theory that such profits accrued to plaintiff as a matter of right by virtue of a constructive trust, since Jensen from the beginning of his operations at Noyes was an officer of plaintiff, receiving a salary therefrom, and charged with certain fiduciary responsibilities; that in fact much of the business procured by Jensen was [fol. 733] business intended for plaintiff by reason of the fact that the shippers specifically designated plaintiff as the broker at Noyes to clear the shipments, and that Jensen fraudulently changed or had changed the bills of lading covering these shipments so that he personally was permitted to clear them and receive the fees therefrom.

Jensen admitted that the bills of lading were altered as charged, but contended that it was done pursuant to the shippers' instructions; that the agreement of September 6, 1938, between him and plaintiff was void under North Dakota statute; and, further, that witness Mackay did advise him and actually read to him the reciprocal agreement between plaintiff and Mackay to the effect that plaintiff would not seek business at the port of Noyes in consideration of Mackay's refraining from soliciting business at the port of Portal. Jensen further asserted that the action should be dismissed because plaintiff had not obtained a certificate of authority as a foreign corporation doing business in this state. The court found that plaintiff was not doing business in this state but was engaged in interstate commerce and therefore was not required to obtain a certificate of authority; that Jensen in his fiduciary capacity as the active officer of the corporation broke faith with the stockholders in establishing his own business at Noyes and converted plain-

tiff's business by a change in the bills of lading; that a constructive trust was created in plaintiff's favor; and that plaintiff was entitled to recover of Jensen the sum of $10,324.80 and from defendant Rime the sum of $2,242.36.

Defendants' numerous assignments of error may be grouped together so as to present the following issues for consideration on this appeal:

(1) Did the trial court err in holding that plaintiff [fol. 734] was engaged in interstate or foreign commerce and not amenable to Minn. St. 1941, § 303.20 (Mason St. 1940 Supp. § 7495-20).

(2) Was the validity of the September 6, 1938, contract between plaintiff and Jensen an issue in the case so as to require a finding that it was illegal and void.

(3) Was the court justified in finding that a fiduciary relationship existed between plaintiff and Jensen, thereby creating a constructive trust in plaintiff's favor for the profits here sued for.

(4) Did the evidence justify the finding that Jensen breached his fiduciary obligation to plaintiff by secretly operating the customhouse brokerage business at Noyes for his personal benefit.

(5) Should the profits awarded to plaintiff, in any event, be limited to November 5, 1940, rather than November 30, 1941, the time of trial.

(6) Was there error in awarding judgment against Rime for $2,242.36.

(7) Did the court err in requiring defendants to turn over to plaintiff all books and records relating to the business at Noyes.

(8) Was Jensen entitled to an offset in the amount of salary earned.

Defendants' first assignment of error raises the question of the power of the state of Minnesota to require plaintiff, by statutory regulation, to obtain a certificate of authority before bringing an action in the courts of this state. Minn. St. 1941, § 303.20 (Mason St. 1940 Supp. § 7495-20), insofar as here material, provides:

"No foreign corporation transacting business in this state without a certificate of authority shall be per-

mitted to maintain an action in any court in this state until such corporation shall have obtained a certificate of authority."

Plaintiff is a North Dakota corporation and has not complied with this requirement. The lower court found "that the customhouse brokers, involved herein, are established [fol. 735] as federal instrumentalities and are engaged in interstate commerce in facilitating the free flow of commerce between the United States and the Dominion of Canada."

Defendants contend that this was error; that plaintiff is not a federal instrumentality engaged in interstate commerce; that the business of plaintiff is purely local and intrastate in character, and, if it affects interstate commerce at all, it does so only indirectly and as an aid and facility of such commerce; that plaintiff is therefore subject to the requirements of the statute and the case should have been dismissed by the lower court.

Plaintiff asserts that the finding was proper; that, inasmuch as its business is so closely related to and directly affects interstate commerce, it is entitled to the privilege of immunity from state regulatory power under U. S. Const. art. I, § 8, which reserves to congress the right to regulate commerce between the states and foreign nations; that it was not doing business within the state within the meaning of the statute and hence not amenable to the requirements thereof. We consider this issue first, inasmuch as a determination thereof adversely to plaintiff disposes of the appeal without the necessity of considering the other issues presented by defendants' assignments of error.

It is well settled that a state may impose such restrictions as it sees fit as a prerequisite to a foreign corporation coming into the state to do business. Bank of Augusta v. Earle, 38 U. S. (Pet.) 519, 588; Lafayette Ins. Co. v. French, 59 U. S. (How.) 404; Paul v. Virginia, 75 U. S. (Wall.) 168; Railway Exp. Agency, Inc., v. Virginia, 282 U. S. 440. Equally well settled, however, is the limitation on the state's right to exclude foreign corporations from doing busi- s [fol. 736] within the state within the meaning of U. S. Const. art. I, § 8, where the business has a substantial relation to interstate commerce. The control of congress over interstate business is exclusive. Gibbons v. Ogden, 22 U. S. (Wheat.) 1. Any attempt on the part of the states to reg-

ulate or interfere with such commerce is void. Crutcher v. Kentucky, 141 U. S. 47; Western Union Tel. Co. v. Kansas, 216 U. S. 1, 7. Statutes similar to the one here invoked by defendants have usually been held to place an undue burden on interstate commerce and hence to be unconstitutional as to foreign corporations engaged in interstate business. Davis v. Farmers Co-op. Equity Co. 262 U. S. 312; Sioux Remedy Co. v. Cope, 235 U. S. 197. The conflict arises in the application of these rules to the facts and circumstances in each particular case and in the determination of the issue of whether the business involved is intrastate in character or has such a vital and substantial relation to commerce as to constitute it interstate business under the commerce clause of the constitution.

Probably no subject in the field of law has created greater ambiguity and confusion among text writers and in court opinions than the interpretation of the commerce clause of the constitution. Because the determination of whether a business is interstate or intrastate commerce is so essentially a federal question, we necessarily look to the decisions of the United States Supreme Court for the broad controlling principles upon which this decision must rest. Palm Vacuum Cleaner Co. v. Bjornstad, 136 Minn. 38, 161 N. W. 215. There has not always been uniformity in the federal decisions even with respect to the general principles to be followed. 4 Missouri L. Rev. 207; Wickard v. Filburn, 317 U. S. 111, 63 S. Ct. 82, 88. In the Wickard case the court exhaustively discusses this matter, and in considering many [fol. 737] prior decisions, says (317 U. S. 122):

> "In some cases sustaining the exercise of federal power over intrastate matters the term 'direct' was used for the purpose of stating, rather than of reaching, a result; in others it was treated as synonymous with 'substantial' or 'material'; and in others it was not used at all. Of late its use has been abandoned in cases dealing with questions of federal power under the Commerce Clause."

In Santa Cruz F. P. Co. v. National L. R. Board, 303 U. S. 453, 466, Mr. Chief Justice Hughes, indicating the difficulty of adopting rigid formulas and the use of the words "direct" and "indirect," uses this language:

> "• • • 'direct' has been contrasted with 'indirect,' and what is 'remote' or 'distant' with what is 'close and

substantial.' Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce,' 'due process,' 'equal protection.'"

Similarly, in the Wickard case, 317 U. S. 111, 124, 63 S. Ct. 82, *supra*, the court states that the mechanical application of legal formulas is no longer feasible. Thus we observe the confusion that has resulted in an attempt to define interstate commerce, but the greater difficulty has arisen in attempting to apply the general principles to the factual situation in each case. It may generally be said, however, that in view of the grant of power by the constitution to congress to regulate interstate commerce, such grant, without any action by congress, prevents the states from exercising any direct control thereof with relation to the subjects embraced within its purview and that the grant is of such a nature as to require that, if there is any regulation, it should be prescribed by the single authority. Minnesota Rate Cases, 230 U. S. 352; Southern Express Co. v. Byers, 240 U. S. 612. Where a subject is national in its character, in- [fol. 738] volves a matter of public policy, and requires uniformity of regulation, congress alone has the prerogative to provide the needed regulations. Louisiana P. S. Comm. v. Texas & New Orleans R. Co. 284 U. S. 125; Missouri P. R. Co. v. Stroud, 267 U. S. 404; York Mfg. Co. v. Colley, 247 U. S. 21; Wickard v. Filburn, *supra*. The fact that congress has been silent in such a case has been held to be a declaration that the particular commerce should be free from regulation. Sanitary District v. United States, 266 U. S. 405; Missouri ex rel. Barrett v. Kansas N. G. Co. 265 U. S. 298; Covington and C. Bridge Co. v. Kentucky, 154 U. S. 204. Despite this well defined power of congress over strictly interstate commerce, it cannot be extended so as to include regulatory control over a business which has no substantial relation to such commerce and does not involve a question of national concern. To permit such control would be voluntarily to eliminate the distinction between what is national and what is local and create a completely centralized government. National L. R. Board v. Jones & Laughlin Steel Corp. 301 U. S. 1. It is clear, therefore, that the power of

congress is paramount in the field of interstate commerce and in matters which affect national public policy and require uniformity of regulation. It is equally clear, however, that this power does not extend to cases where the business is local or intrastate. Schechter Poultry Corp. v. United States, 295 U. S. 495; National L. R. Board v. Jones & Laughlin Steel Corp., *supra*; Minnesota Rate Cases, 230 U. S. 352, *supra*.

The greatest difficulty does not arise in these two classes of cases where it appears reasonably clear that the business is either strictly local and has no connection whatever with [fol. 739] interstate commerce or where the business is of an interstate character and a matter of national concern. The real problem is presented in those situations where the business may to some extent affect interstate commerce, where congress has not seen fit to regulate, and where no question of national public policy is involved. In that group of cases the line of demarcation cannot always be clearly drawn. But a case must necessarily fall within one class or the other, depending upon how substantially the commerce has been affected. The question must be determined upon the particular circumstances and rights involved in each situation. Hall v. DeCuir, 95 U. S. 485. In the recent case of Cohn-Hall-Marx Co. v. Feinberg, — Minn. —, 8 N. W. (2d) 825, filed April 2, 1943, this court held that whether the business in question was one having the attributes of interstate commerce or intrastate commerce was a question of fact. In such doubtful cases the fact that a business is local in character is an important factor for consideration. The following language, found in Wickard v. Filburn, 317 U. S. 111, 124, *supra*, is pertinent here:

> "That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. *The same consideration might help in determining whether in the absence of Congressional action it would be permissible for the state to exert its power on the subject matter, even though in so doing it to some degree affected interstate commerce.* * * * it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" (Italics supplied.)

In this group of cases where no substantial effect upon the commerce appears, absent congressional regulation, the states are free to act. When congress does act, however, the exercise of its authority overrides all conflicting state [fol. 740] regulation where the exercise of such power has a real or substantial relation to some part of the commerce itself. Minnesota Rate Cases, *supra;* Second Employers' Liability Cases, 223 U. S. 1; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186. If the effect of intrastate transactions under interstate commerce is only remote and does not encroach substantially thereon, such transactions remain within the province of state power. Hammer v. Dagenhart, 247 U. S. 251; Minnesota Rate Cases, *supra;* Covington and C. Bridge Co. v. Kentucky, 154 U. S. 204, *supra;* Adair v. United States, 208 U. S. 161.

The law applicable to this vexatious and difficult problem is summarized by Mr. Chief Justice Stone in the case of United States v. Wrightwood Dairy Co. 315 U. S. 110, 119, in the following language:

> "The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. * * * The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. * * * It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. *Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.*"

The ultimate question in the instant case then is: Did the customhouse brokerage business conducted by plaintiff *in a substantial way interfere with or obstruct the exercise of the granted power of congress to regulate interstate commerce.*

In applying this principle so recently enunciated by the Supreme Court of the United States to the facts here pre-

sented, it is necessary to consider the character of the busi-
[fol. 741] ness in which plaintiff was engaged. Customhouse brokers are not public officers but perform purely personal services as agents of the shippers. Duluth S. S. & A. Ry. Co. v. Wilson, 200 Mich. 313, 167 N. W. 55; People ex rel. Tower v. State Tax Comm. 282 N. Y. 407, 26 N. E. (2d) 955; State v. Wm. J. Oberle, Inc. 190 La. 1053, 183 So. 347. True, under the tariff act, customhouse brokers are required to be licensed in order to do business, but the sole purpose of that requirement is to protect the collection of tariffs due the federal government. State v. Wm. J. Oberle, Inc., *supra*. The office of plaintiff was situated in Noyes, Minnesota, and all of its records pertaining to that business were kept there. The business was transacted entirely within the borders of this state. It had nothing whatever to do with the actual importation or exportation of articles of commerce. Its duty as an agent of the shipper was merely to pay the customs duties and make settlement subsequently with its principal, the shipper. Customhouse brokers represent private persons. They receive no fees or emoluments from the federal government. A customhouse broker's license authorizes the holder to transact business in certain customs collection districts. He cannot represent a claimant before the treasury department unless enrolled as attorney or agent in conformity with the requirements of the department. We think this quite far removed from being an agent of the United States, or being engaged in a governmental function. It is urged that because the customhouse broker pays the duties he has a direct and substantial connection with the commerce; that the commerce would be delayed if the duties were not paid. It must be borne in mind, however, that under the tariff act the shipper him-
[fol. 742] self or his agent can perform this service. Article 1411, Custom Regulations of 1937, provides in part:

> "(a) An importer or exporter transacting customs business solely on his own account and in no sense on behalf of another is not required to be licensed, nor are his authorized regular employees or officers who act only for him in the transaction of such business."

The broker acts as an independent contractor to perform this personal service for the shipper. He does not come into contact with the commerce itself in any way insofar as its actual movement is concerned. He is at the most an aid

or facility to the commerce and but remotely, if at all, affects it. We fail to see how such broker is an instrumentality of the commerce. Therefore, it seems to us that the statutory requirement is not an obstruction or interference with interstate commerce.

Plaintiff relies upon the case of Stafford v. Wallace, 258 U. S. 495, 42 S. Ct. 397, 66 L. ed. 735, in support of its position that the business here in question is interstate commerce. We believe that case to be distinguishable upon the facts. There congress had definitely exercised its prerogative to legislate concerning a matter of national public concern and public policy. There had developed considerable abuse in the shipping and packing house industry, and congress saw fit to eliminate these abuses by appropriate legislation. The commission men in the Wallace case had actual contact with the movement of the commerce itself, and it was clearly a matter of interstate concern affecting all of the states alike. In the instant case, the matter of public policy or public concern is not involved. The customhouse brokerage business is purely a private business conducted for personal profit. Congress has merely provided that such brokers shall be licensed before doing business in order to [fol. 743] insure the collection of the tariff owing the United States. We therefore feel that the Wallace case is not in point here.

While the case of Puget Sound Stevedoring Co. v. State Tax Comm. 302 U. S. 90, 58 S. Ct. 72, 82 L. ed. 68, is not squarely in point, we believe that that phase of it having to do with the furnishing of employes to the steamship companies for stevedoring duties where the company did not exercise any control or direction over their duties is more closely analogous. In that case the court determined that where the stevedoring corporation furnished the laborers and retained supervision and control over their activities, where they actually assisted in loading and unloading the articles of commerce, such activity was interstate commerce; but that if these employes had been furnished to the steamship companies without supervision or direction, then there was no direct relation to the commerce and the employer would be but an independent contractor. Similarly, the customhouse broker, in paying the duties, is but an independent contractor under his contractual relationship with the shipper. State v. Wm. J. Oberle, Inc., 190 La. 1053, 183 So. 347, *supra*.

Although the United States Supreme Court has not passed directly on the precise question here presented, the supreme court of Louisiana has had occasion to consider it. In a well-reasoned opinion it has held that the business of a customhouse broker is intrastate rather than interstate in character. State v. Wm. J. Oberle, Inc. *supra*. There the state of Louisiana sought to impose upon defendant, a customhouse broker, an occupational license tax, and contended that the defendant was engaged in a purely private business [fol. 744] and subject to the general tax. The defendant asserted that he was a customhouse broker, duly licensed by the secretary of the treasury of the United States, and could not be subjected to such a tax (190 La. 1055), "as to do so would unconstitutionally burden 'a purely Federal and quasi Federal function', and would interfere 'with the commerce laws of the United States and particularly with the importation and exportation of commerce.'" In considering the nature of defendant's business, the court said (190 La. 1058):

> "We fail to see wherein the occupational license tax to which the State seeks to subject defendant, as a customhouse broker, would interfere 'with the commerce laws of the United States and particularly the importation and exportation of commerce', as contended by defendant. The evidence fails to show that defendant is engaged in either. Defendant receives its business from importers of merchandise, private persons. • • • Defendant is not itself an importer of merchandise. If it were, it would not be licensed as a customhouse broker."

And, further (190 La. 1059):

> "The State in this case is not demanding that defendant pay an occupational license tax as an importer, but only on its receipts, as customhouse broker, from importers of merchandise, private persons, a purely local business."

Fortifying the conclusion that customhouse brokerage business is intrastate rather than interstate is the case of People ex rel. Tower v. State Tax Comm., 282 N. Y. 407, 26 N. E. (2d) 955. Although in that case this issue was not directly involved, the court, in holding that the business was subject to a professional tax, inferentially held that it was

doing business within the state and amenable to state regulation and therefore not engaged in interstate commerce. See also Duluth S. S. & A. Ry. Co. v. Wilson, 200 Mich. 313, 167 N. W. 55, wherein the customhouse broker was held not to be a public officer. Significant in the instant case is [fol. 745] the fact that the treasury department, under date of April 20, 1936, issued a regulation, § 6 of which in part provides (Art. 1410, Customs Regulations of 1937):

> "However, a licensee having a license in force in one district may on application to the Committee be granted a license to transact busines in another district without further examination, provided it appears on investigation that the licensee is authorized to do business in the State or States in which such other district is situated, and is prepared and qualified to render efficient service in such other district."

Subsequent to the adoption of this regulation, congress amended the tariff act in several respects, although the provisions governing customhouse brokers have remained substantially the same. By such regulation the treasury department has placed a practical construction on the character of the customhouse brokerage business as affecting commerce. It infers that it was the opinion of the treasury department that the statutory provision requiring a certificate of authority from a foreign corporation, as relating to such business, did not encroach upon interstate commerce. The provision that brokers may qualify to do business in more than one district, provided they are authorized to do business in the particular states in which such other districts are located, definitely implies that the department considers such business truly local and intrastate; and surely, if the business is intrastate when operated in two or more districts, it is equally intrastate when operated in a single district. Inasmuch as the tariff act was revised subsequent to the regulatory provision referred to without modifying this provision, "under the established rule Congress must be taken to have approved the administrative construction and thereby to have given it the force of law." Helvering v. R. J. Reynolds Tobacco Co. 306 U. S. 110, 115. [fol. 746] Since early days when Chief Justice Marshall in Gibbons v. Ogden, 22 U. S. (Wheat.) 1, so clearly set forth the principles to be applied in construing the commerce clause, there have been alternatively restrictive and broad

interpretations given to this provision of the constitution. Revealing the present day trend of the effect of state regulation upon the commerce, even where congress has legislated, is the recent case of Parker v. Brown, 317 U. S. 341, 63 Supp. Ct. 307, discussed in Vol. 27, Minn. L. Rev. p. 468. When abuses creep into our national economy or where other problems arise which are of vital public concern and present issues of national public policy, it is natural and commendable that the commerce clause should be given a broad interpretation so as to sustain legislation by the congress having for its laudable purpose the elimination of abuses and the solution of these problems. As the court said in Wickard v. Filburn, 317 U. S. 122, *supra*:

> "Even while important opinions in this line of restrictive authority were being written, however, other cases called for the broader interpretations of the Commerce Clause destined to supersede the earlier ones, and to bring about a return to the principles first enunciated by Chief Justice Marshall in Gibbons v. Ogden, *supra*."

While it is our duty fully to recognize this most recent trend in the construction of the commerce clause by the Supreme Court of the United States, we are unable to find, even in these recent decisions, any inclination on the court's part to interfere in purely local intrastate matters. It is entirely consistent with these decisions and in harmony therewith for the courts, when confronted by varying factual situations involving the commerce clause, to preserve whenever possible that fine balance between national and state solidarity which has been characteristic of our government [fol. 747] during its century and a half of existence. Where congress has not stepped into the field of regulation because of the fact that some national public policy or concern is not involved, and where the business, as here, is local in character, relates only to personal services, is conducted for private profit, and is not an instrumentality of commerce, the courts should be loathe to suggest that the state cannot enforce a reasonable regulation for the benefit of its citizens such as the statute here in question. The provisions of this statute require foreign corporations to obtain a certificate of authority as a prerequisite to maintaining an action in the courts of this state. We believe that this is a reasonable requirement, and not a hardship upon the

business. Nor do we think that it is an obstruction upon the commerce itself nor an interference therewith under the facts in the instant case. On the other hand, it is a protection to the people of this state in providing for them a method for the service of process upon a foreign corporation without the necessity of going into a foreign jurisdiction to secure relief. Where the business so remotely affects the commerce, if at all, we conclude that the statutory requirement is a proper regulation for the state to prescribe, and that the constitutional power of congress is in no way impaired thereby.

Defendants' motion to dismiss the action at the close of plaintiff's case therefore should have been granted.

Reversed.

Luther Youngdahl.

[fol. 748] STATE OF MINNESOTA, SUPREME COURT

33388

UNION BROKERAGE COMPANY, a Corporation, Respondent,

vs.

NORMAN G. JENSEN and CURTIS M. RIME, Appellants

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Kittson, be and the same hereby is in all things reversed.

And it is further determined and adjudged that appellants herein, do have and recover of respondent herein the sum and amount of Nine Hundred Ninety-Three and 59/100 Dollars, ($993.59) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Date and signed June 3, 1943, by the Court.

Attest: Grace Kaercher Davis, Clerk.

STATEMENT FOR JUDGMENT

Statutory Costs $25.00. Printer $608.57. Clerk $5.00. Acknowledgments $——. Return $10.00. Postage and Ex-

press $——. Appeal Bond $110.00. Transcript $235.02; Total $993.59.

Satisfaction of Judgment filed.

Therefore the above judgment is duly satisfied in full and discharged of record.

Attest: —— ——, Clerk
By: —— ——, Deputy.

STATE OF MINNESOTA,
Supreme Court, ss:

I, Grace Kaercher Davis, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, June 3, 1943.

Grace Kaercher Davis, Clerk, by —— ——, Deputy.

[Endorsed:] State of Minnesota, Supreme Court. 33388. Union Brokerage Company, a Corporation, Respondent, vs Norman G. Jensen, et al., Appellants, Transcript of Judgment.

[fol. 749] STATE OF MINNESOTA, IN SUPREME COURT

33388

UNION BROKERAGE COMPANY, a Corporation, Plaintiff-Respondent,

vs.

NORMAN G. JENSEN and CURTIS RIME, Defendants-Appellants

STIPULATION

Whereas the Plaintiff-Respondent is about to apply to the Supreme Court of the United States for a Writ of Certiorari to review the decision and judgment of the Supreme Court of the State of Minnesota in the above entitled proceeding and has submitted its proposed Order staying pro-

ceedings and the bond required to secure a stay of proceedings for the approval of the Appellants, by the attorneys for the appellants above named,

It is Stipulated as Follows:

1. It is stipulated and agreed by and between the parties to the above entitled action, by and through their respective attorneys of record, that the form of the bond proposed to be so furnished by the Plaintiff-Respondent above named, is approved.

2. That the form of the proposed Order for Staying Execution is hereby approved.

3. That the Chief Justice of the Court above named, or any of the Justices thereof, is hereby authorized to approve said Bond when executed with sufficient surety, and to sign the Order staying proceedings in the form hereto annexed.

Dated: June 2nd, 1943.

Leonard Eriksson, Attorney for Plaintiff-Respondent; Bundlie, Kelley & Finley, Attorneys for Defendants-Appellants.

[fol. 750] STATE OF MINNESOTA, IN SUPREME COURT

33388

UNION BROKERAGE COMPANY, a Corporation, Plaintiff-Respondent,

v.

NORMAN G. JENSEN and CURTIS RIME, Defendants-Appellants

ORDER STAYING EXECUTION

On reading and filing the annexed Motion herein of and on behalf of the Union Brokerage Company, a corporation, Plaintiff-Respondent, for a stay of execution of the judgment entered herein May 25, 1943, pursuant to the decision of this Court dated May 14, 1943, and pending the decision of the Supreme Court of the United States on the applica-

tion of said Union Brokerage Company for a Writ of Certiorari, addressed to said Supreme Court of the United States to review said judgment and decision made and entered as aforesaid, is hereby granted.

It Is Further Ordered that execution of said judgment is hereby stayed until the disposition of the Plaintiff-Respondent's application for said Writ of Certiorari. Provided that the said Union Brokerage Company shall on or before June 5, 1943, file herein its undertaking, under seal, with surety to be approved by this Court, or by one of the Justices thereof, in the maximum penalty of $1,250.00, conditioned that if it, the said Union Brokerage Company shall on or before June make application for a Writ of Certiorari to the Supreme Court of the United States within the period allotted therefor, or fails to obtain an Order granting its application, or fails to make its plea good in the Supreme Court of the United States, it shall answer for all damages and costs which the said Norman G. Jensen and Curtis Rime may sustain by reason of said stay.

Dated at Saint Paul, Minnesota, this 4th day of June, 1943.

By the Court:

Henry M. Gallagher, Chief Justice of the Supreme Court of the State of Minnesota.

[fol. 751] State of Minnesota in Supreme Court

33388

Union Brokerage Company, a Corporation, Plaintiff-Respondent,

vs.

Norman G. Jensen and Curtis Rime, Defendant-Appellants

Motion for Stay of Execution Pending Application for Writ of Certiorari

To the Honorable, the Justices of the Supreme Court of the State of Minnesota:

Now comes Union Brokerage Company, a corporation, the above named Plaintiff-Respondent, and moves the Court for an Order staying execution of any and all proceedings to enforce the judgment entered in favor of the Defendants-Appellants herein on May 25, 1943, pursuant to the decision of this Court dated May 14, 1943, pending disposi-

tion of Plaintiff-Respondent's application to the Supreme Court of the United States for a Writ of Certiorari to review the decision and judgment of this Court rendered as aforesaid.

Said motion is made on the ground that the said Union Brokerage Company, Plaintiff-Respondent, is in good faith proceeding to apply for a Writ of Certiorari to review said decision of this Court by the Supreme Court of the United States, and on the ground that unless said judgment is stayed pending said last mentioned proceeding, the plaintiff-respondent will suffer irreparable injury, and on the annexed Affidavits.

Leonard Eriksson, Attorney for Plaintiff-Respondent, Fergus Falls, Minnesota. Lewis L. Drill, 903 Commerce Building, Saint Paul, Minnesota, and James S. Eriksson, Fergus Falls, Minnesota, of Counsel.

[fol. 752] STATE OF MINNESOTA IN SUPREME COURT

33388

UNION BROKERAGE COMPANY, a Corporation, Plaintiff-Respondent,

vs.

NORMAN G. JENSEN and CURTIS RIME, Defendants-Appellants

AFFIDAVIT OF: NAN W. ANDERSON AND ANNIE KRAMER

STATE OF MINNESOTA,
County of Ramsey, ss:

Nan W. Anderson and Annie Kramer, being each duly sworn, each say upon their oaths:

That they are respectively the president and the Secretary of the Union Brokerage Company, a corporation, the plaintiff-respondent in the cause above entitled.

That they are also, respectively, the principal stockholders and two of the directors of said corporation.

That the corporation above named, by its Board of Directors, has duly adopted a resolution authorizing and directing these affiants to institute and prosecute its application for a writ of certiorari to the Supreme Court of the United States for a review of the decision and judgment rendered in the cause above entitled by the Court above named on May 14, 1943, because said corporation feels aggrieved

thereby, and that in order to effect said review proceedings, and to enable these affiants to discharge the duty imposed on them as aforesaid, and to secure time within which to apply for the necessary writ of certiorari by the Supreme Court of the United States without loss to their corporation, it is necessary and in furtherance of justice that a stay of execution of the judgment entered in this Court pursuant to said decision on May 25, 1943, be granted as provided for by Section 350, Title 28, U. S. C. A. (Act of February 13, 1925, c. 229).

That the plaintiff-respondent submits herewith a good and sufficient bond in the penal sum of $1,250.00 for ap-[fol. 753] proval as a stay bond to protect the interests of the defendants-appellants under said judgment pending the outcome in the Supreme Court of the United States of plaintiff-respondent's application for a writ of certiorari as aforesaid.

That the review proceedings begun and hereafter continued in this cause are made in good faith.

That unless the order for the stay of execution if granted, the said plaintiff-respondent will suffer irreparable injury.

Nan W. Anderson, Annie Kramer.

Subscribed and sworn to before me this 3rd day of June, 1943. Lewis L. Drill, Notary Public, Ramsey County, Minn. (Seal.) My Commission Expires April 9, 1949.

[fol. 754] State of Minnesota in Supreme Court

33388

Union Brokerage Company, a Corporation, Plaintiff-Respondent,

vs.

Norman G. Jensen and Curtis Rime, Defendants-Appellants

Affidavit of Leonard Eriksson in Support of Motion

State of Minnesota,
County of Ramsey, ss:

Leonard Eriksson, being first duly sworn, says upon his oath:

That he is one of the attorneys of the plaintiff-respondent in the action above entitled, and is familiar with the relief

granted by the District Court of the Fourteenth Judicial District, and with the practical effect thereof, as well as with the practical effect of the decision of this Court, upon the business and property of the plaintiff.

That among the relief granted by the trial court was the provision that the defendants should surrender and turn over to this plaintiff all records, correspondence, accounts and commissions accrued from the conduct of the customhouse brokerage business carried on at Noyes, Minnesota, by the defendants since July 1, 1940, to and including November 30, 1941.

That said records and accounts pertaining to, and accruing from, said customhouse brokerage business at said place during the aforesaid time are, for all practical purposes, irreplaceable, and of the greatest conceivable value and need to the future conduct of said customhouse brokerage business by the plaintiff.

That the commissions involved in, and due from, the payment of refunds on entries protested according to law during said period of time are of great value; that the amount thereof for said period of time, as affiant is informed and verily believes, ranges between $2,000.00 and $3,500.00; that a part of said commissions have already been received by the defendants; that the stay bond executed by the defendants is insufficient to protect the plaintiff against the loss of said commissions; that there is available, or about to become available, other commissions on entries protested [fol. 755] and ordered to be reliquidated, or about to be ordered reliquidated, by the Customs Court of the United States, a sum of money ranging between $1,500.00 and $2,500.00.

That the defendants are either insolvent or so keep their property concealed that without the security afforded by the existing stay bond, the holding of the money garnisheed, and keeping the action in status quo during the pendency of the review proceedings ordered to be instituted and prosecuted by the plaintiff, the plaintiff above named will suffer the loss of its records and of its money to plaintiff's great and irreparable loss and damage.

That the direct money judgment rendered by the trial court in this cause, with accrued interest and costs, exceeds in amount the sum of $10,000.00. That to insure the payment of said judgment the defendants above named furnished a corporate surety bond in the penal sum of

$11,000.00, and no more, and said bond was a stay bond. That unless the order staying proceedings for the enforcement of the judgment entered in this court in favor of the defendants on said appeal, said $11,000.00 appeal and stay bond of the defendants may be annulled, and the surety thereon discharged. That thereby this plaintiff will be deprived of the security now available for the payment of the money judgment aforesaid. That without the security afforded to the plaintiff by said bond in the penal sum of $11,000.00 the plaintiff will lose all chance to recover the money due to plaintiff which was adjudged in its favor in the event the Supreme Court of the United States shall reverse the decision and judgment of this court.

That this affidavit is made in support of plaintiff's motion for a stay of all proceedings in this court pending the determination of plaintiff's review proceedings in the United States Supreme Court.

Leonard Eriksson.

Subscribed and sworn to before me this 3rd day of June, 1943, Lewis L. Drill, Notary Public, Ramsey County, Minn. (Seal.) My commission expires April 9, 1949.

Supreme Court Filed Jun. 4, 1943. Grace Kaercher Davis, Clerk.

[fol. 756] State of Minnesota in Supreme Court

33388

Union Brokerage Company, a Corporation, Plaintiff-Respondent,

vs.

Norman G. Jensen and Curtis Rime, Defendant-Appellants

Bond on Stay of Execution

The Court, having ordered a stay of execution of the judgment rendered herein on May 25, 1943, pursuant to the Court's decision in the above entitled matter on the 14th day of May, 1943, pending the disposition of an application for a Writ of Certiorari by the Union Brokerage Company, a corporation, the Plaintiff-Respondent above

named, to the Supreme Court of the United States to review the said decision and judgment of the Court above named rendered as aforesaid, on the condition that the plaintiff-respondent above named give an undertaking, with sureties to be approved by this Court, in the sum of $1,250.00, conditioned that if the said Union Brokerage Company, Plaintiff-Respondent, fails to make application for such Writ within the period allotted therefor, or fails to obtain an order granting its application, or fails to make its plea good in the Supreme Court of the United States, it shall answer for all damages and costs which the Defendants-Appellants may sustain by reason of said stay.

Now, therefore, pursuant to the terms of said order staying the execution of said judgment, the undersigned Union Brokerage Company, a corporation, as principal, and *United States Casualty Company, a corporation of the State of New York*, as surety, are hereby jointly and severally held and firmly bound to Norman G. Jensen and Curtis Rime, Defendants-Appellants, their executors, representatives, heirs and assigns in the amount of $1,250.00, lawful money of the United States, to the payment of which well and truly to be made to the said Norman G. Jensen and Curtis Rime, the said Union Brokerage Company, a corporation, as aforesaid, and *the said United States Casualty Company, a corporation of the State of New York*, as surety, hereby bind ourselves and each of us, our and each of our successors and assigns firmly by these presents. [fol. 757] The condition of this obligation is that if the Union Brokerage Company, a corporation, Plaintiff-Respondent, fails to make application for a Writ of Certiorari to the Supreme Court of the United States within the period allotted therefor, or fails to obtain an Order granting its application, or fails to make its plea good in the Supreme Court of the United States, it shall answer for all damages and costs which the said Norman G. Jensen and Curtis Rime may sustain by reason of said stay.

This bond is given pursuant to Section 350, Title 28, U. S. C. A. (Act of February 13, 1925, c. 229).

In Witness Whereof, the said Union Brokerage Company, a corporation, and the said *United States Casualty Company, a corporation of the State of New York*, have hereto affixed their respective seals and caused the same

to be executed by its proper offices this *4th* day of June, 1943.

Union Brokerage Company, By Nan W. Anderson, Its President, Annie Kramer, Its Secretary.

United States Casualty Company, By Earl H. Sauer, Attorney-in-Fact. (Seal.)

In presence of the undersigned as witness Lewis L. Drill, Leonard Eriksson.

STATE OF MINNESOTA,
County of Minnesota, ss.

On this 4th day of June, A. D. 1943, before me, a Notary Public, within and for said County and State, personally appeared Earl H. Sauer, to me personally known, who being by me duly sworn, did say that he is the Attorney-in-Fact of and for the United States Casualty Company, a New York corporation; that the seal affixed to the foregoing instrument is the corporate seal of the said Company; that said instrument was signed and sealed in behalf of said Company by authority of its Board of Trustees; and the said Earl H. Sauer did acknowledge that he executed the said instrument as the free act and deed of said Company.

Lewis L. Drill, Notary Public, Ramsey County, Minn. My commission Expires April 9, 1949.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 4th day of June, 1943, before me, a Notary Public within and for said County, personally appeared Annie Kramer and Nan W. Anderson, to me personally known, who, being each by me duly sworn, did say that they are, respectively, the President and Secretary of the Union Brokerage Company, a corporation, named in the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corpora- [fol. 758] tion by authority of its Board of Directors and said Annie Kramer and Nan W. Anderson acknowledged

said instrument to be the free act and deed of said corporation.

Lewis L. Drill, Notary Public, Ramsey County, Minn. My Commission Expires April 9, 1949, (Seal.)

O. K. as to form, O. T. Bundlie.

Supreme Court, Filed Jun 4—1943. Grace Kaercher Davis, Clerk.

The within bond and the sureties thereon is hereby approved this 4th day of June 1943.

Henry M. Gallagher, Chief Justice, Minnesota Supreme Court.

[fol. 759] Assignments of Error

I

The findings of fact, conclusions of law, and judgment are contrary to law, in the particulars following:

A.

The Court erred in holding, as a matter of law (part of its Finding 5; R. p. 699, ff. 1)

". . . That the customhouse brokers, involved herein, are established as federal instrumentalities and are engaged in interstate commerce in facilitating the free flow of commerce between the United States and the Dominion of Canada." • • • .

D.

The Court erred, as a matter of law, in denying defendants' motion for dismissal of action (exceptions allowed as to all adverse rulings; R. p. 288, ff. 1, 2), made upon the conclusion of plaintiff's case (R. p. 625, ff. 2, 3; R. p. 626, f. 1) as follows:

"Mr. Murphy: Plaintiff having rested the defendants move that this action be dismissed on the following grounds: First, it appears of the record that the plaintiff is a foreign corporation, that is, a corporation of the State of North Dakota and is transacting business in the State of Minnesota and has before the commencement of this action without the certificate of authority as required by the laws of the State of

Minnesota and is not entitled to sue in the State of Minnesota; second, on the ground that the evidence wholly fails to prove or sustain any of the allegations contained in the plaintiff's complaint; third, we move to dismiss as to the defendant Rine (Rime) as there is absolutely no evidence in this case which in any way tends to prove or sustain any allegations as to him, it appearing from the record that he never at any time had been affiliated with or employed by or connected with the plaintiff company and was under no obligation or duty of any kind with respect to the same. I want to make that motion for the record at this time."

* * * * * * *

"1

"That plaintiff have and recover of the defendant Norman G. Jensen, the sum of nine thousand six hundred eighteen and 44/100 ($9,618.44) dollars with interest thereon from November 30, 1941, at the rate of six (6%) per cent per annum.

"2

That plaintiff have and recover of the defendant Curtis M. Rime, the sum of one thousand eight hundred seventy-five (one) and 66/100 ($1,871.66) dollars with interest thereon at the rate of six (6%) per cent. per annum from and after the 30th day of November, 1941; that any amount paid on the judgment so entered against the defendant, Curtis M. Rime, shall be credited upon the judgment so entered against the defendant Norman G. Jensen.

[fol. 760] "3

That the defendants, and each and both thereof, surrender and deliver to plaintiff, or its authorized agent or officer, all books of account, correspondence, claims for rebate, and other records and files pertaining to the business conducted at Noyes, Minnesota, from the beginning thereof on July 1, 1940, to and including the 30th day of November, 1941, and that they, and each and both thereof, assign to plaintiff all

claims for rebates, commissions, fees, or other income due or to become due, on account of business so conducted prior to and including the 30th day of November, 1941, upon the assumption of liability on the part of plaintiff for any amount that is due or may become due for underpayments or money due or to become due the United States Government on account of said business."

II (G)

Finding 24 (R. p. 709, F. 3; R. p. 710, ff. 1, 2, 3, R. p. 711, f. 1) as follows:

"That after re-routing of said business many of the shippers with whom plaintiff had formerly done business at Portal continued to consign their shipments to plaintiff at Noyes, Minnesota; that said shipments could not be cleared at Noyes, Minnesota, by the defendant Jensen in his own name without causing a change to be made in the bill of lading; that in order to enable him to appropriate said business to his own use, the defendant Jensen had procured a rubber stamp containing thereon his own name, which he left at the depot at Emerson, Manitoba which is the port of exit of shipments entering the United States at the port of Noyes; that the defendant Jensen then prepared and left with the agent in charge of the depot at Noyes, Minnesota, instructions in writing reading as follows:

Mr. MacKenzie, June 29, 1940.
Noyes, Minn.

Sir:

Kindly deliver to Mr. Curtis Rime all bills of lading, and invoices for shipments to be cleared through customs by Norman G. Jensen or Union Brokerage Co.

Sincerely, Norman G. Jensen.

that pursuant to said instructions, and acting upon the belief that the defendant Jensen was acting for plaintiff as its officer, bills of lading consigned to plaintiff were delivered to the defendant Rime; that

he thereupon took said bills of lading to the depot at Emerson, Manitoba, stamped the name of Norman G. Jensen over the name of plaintiff and altered the same so as to show Jensen's name as broker consignee and thereafter cleared said shipments in Jensen's name at Noyes, Minnesota."

[fol. 761] II (N)

Finding 33 (R. p. 716, f. 3; R. p. 717, f. 1) as follows:

"That the defendant Jensen, while establishing said business at Noyes, was acting in a fiduciary capacity for plaintiff; that he owed it a duty of disclosing the information acquired while so acting, affecting, or about to seriously affect, its business; that he wrongfully converted said business to his own use; that said business and the income and profits thereof in equity and good conscience belonged to plaintiff and that the defendants held and operated the same in trust for the plaintiff during the times herein stated."

II (P)

Conclusions of Law 1 (R. p. 717, f. 3) as follows:

"That plaintiff have and recover of the defendant, Norman G. Jensen the sum of nine thousand six hundred eighteen and 44/100 ($9,618.44) dollars, with interest thereon from November 30, 1941, at the rate of six (6%) per cent per annum."

II (Q)

Conclusions of Law 2 (R. p. 717, f. 3; R. p. 718, f. 1) as follows:

"That plaintiff have and recover of the defendant Curtis M. Rime, the sum of One thousand eight hundred seventy-five (one) and 66/100 ($1,871.66) dollars with interest thereon at the rate of six (6%) per cent. per annum from and after the 30th day of November, 1941; that any amount paid on the judgment so entered against the defendant, Curtis M. Rime, shall be credited upon the judgment so entered against the defendant, Norman G. Jensen."

II (K)

Conclusions of Law (R. R. p. 718, ff. 2, 3) as follows:

"That the defendants, and each and both thereof, surrender and deliver to plaintiff or its authorized agent or officer, all books of account, correspondence, claims for rebate, and other records and files pertaining to the business conducted at Noyes, Minnesota, from the beginning thereof on July 1, 1940, to and including the 30th day of November, 1941, and that they, and each and both thereof, assign to plaintiff all claims for rebates, commissions, fees or other income due or to become due, on account of business so conducted prior to and including the 30th day of November, 1941, upon the assumption of liability on the part of plaintiff for any amount that is due or may become due for under payments of money due or to become due the United States government on account of said business."

III

That the judgment entered and filed on August 20, 1942, pursuant to said findings of fact, conclusions of law and order for judgment (R. pp. 721, 722, 723 and 724) is contrary to law and the evidence, except as to the dismissal of the second cause of action. (R. p. 724, f. 1).

[fol. 762] STATE OF MINNESOTA, IN SUPREME COURT

I, Grace Kaercher Davis, Clerk of said Court, do hereby certify that the foregoing pages numbered from 1 to 761 inclusive, are a true, full and complete transcript of the record and proceedings in the case of, 33388, Union Brokerage Co., Respondent, vs. Norman G. Jenson, et al., Appellants, and the opinion of the court rendered therein, as the same now appear on file in my office.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court at my office in the city of St. Paul, Minnesota, this 30th day of June, 1943.

Grace Kaercher Davis, Clerk of Supreme Court, by Mae Sherman, Deputy. (Seal.)

ORDER ALLOWING CERTIORARI—Filed October 11, 1943

The petition herein for a writ of certiorari to the Supreme Court of the State of Minnesota is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on back cover: File No. 47,784. Minnesota, Supreme Court, Term No. 291. Union Brokerage Company, Petitioner, vs. Norman G. Jensen and Curtis M. Rime. Petition for a writ of certiorari and exhibit thereto. Filed August 25, 1943. Term No. 291 O. T. 1943.

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